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REPORTS OF CASES

DECIDED IN THE
C

SUPREME COURT

OF THE

STATE OF OREGON

ROBERT G. MORROW

REPORTER

VOLUME 46

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Rec. March 14, 1909

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OF THE

SUPREME COURT

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* Judge Moore was Chief Justice until January 9, 1905, when he became Associate Justice, having been re-elected.

† Judge Wolverton became Chief Justice on January 9, 1905.

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CASES DECIDED
IN THE
SUPREME COURT
OF THE
STATE OF OREGON.

Decided 12 December, 1904.

SMITH v. NELSON.

78 Pac. 740.

FACTS BEFORE THE COURT.

1. In a suit to cancel a decree against plaintiff for the amount due on a note, as a cloud on the title to his realty, and to enjoin its enforcement, evidence examined, and *held* sufficient to show that defendant, at the time of the assignment by plaintiff of a mortgage securing the note, entered into an agreement in writing to indemnify plaintiff against the payment of the note, as a consideration of plaintiff's assignment of the mortgage.

SUIT TO CANCEL A DECREE—BILL OF REVIEW.

2. A suit to cancel a decree against plaintiff for the amount due on a note, as a cloud on the title to his realty, and to enjoin its enforcement, on the ground that defendant had agreed with plaintiff to indemnify him against the payment of the note, as a consideration of plaintiff's assignment of the mortgage securing the note, is not in the nature of a bill of review, within B. & C. Comp. § 391, abolishing that form of suit.

SUIT TO CANCEL A JUDGMENT AND DECREE.

3. Plaintiff executed as surety a note, which was delivered to defendant, but plaintiff gained possession of the mortgage given by the principals to secure the note. The mortgage was assigned by the plaintiff on defendant's agreeing to indemnify the plaintiff against the payment of the note. The note and mortgage fell into the hands of a bona fide holder, who sued the plaintiff and the principals in the note and mortgage, and obtained a decree of foreclosure. Subsequently the holder of the decree assigned it, partially unsatisfied, to the defendant, who was not a party to the foreclosure proceeding. *Held*, that plaintiff was entitled to sue to cancel the decree in the hands of defendant, as a cloud on plaintiff's title and enjoin its enforcement.

AGREEMENT VOID AS AGAINST PUBLIC POLICY.

4. A contention that as the arrangement whereby the mortgage was executed was entered into to avoid the payment of taxes on the mortgage, it constituted a fraud on the public, and that therefore the suit could not be maintained, is untenable, it appearing that the note was taxable; and hence there could have been no avoidance of taxes due the county, even though no taxes were collectible on the mortgage.

From Umatilla: WILLIAM R. ELLIS, Judge.

Suit by E. L. Smith against A. Nelson and the sheriff of Umatilla County to enjoin a sale under a decree. From an order granting the desired relief defendants appeal.

AFFIRMED.

For appellant there was a brief over the names of *Oscar Cain*, *Hailey & Lowell*, and *Dan P. Smythe*, with an oral argument by *Mr. Cain* and *Mr. Stephen A. Lowell*.

For respondent there was a brief over the names of *James A. Fee* and *Carter & Raley*, with an oral argument by *Mr. Charles H. Carter* and *Mr. Fee*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

This suit is based upon the following facts: On November 22, 1892, one J. F. Carrier borrowed of Nelson \$1,000, for which he, together with his wife and the plaintiff, E. L. Smith, executed their joint and several promissory note, payable twelve months after date. The note calls for \$1,050, but \$50 was included to cover some expenses in the negotiations. Smith signed the note as security—whether at the instance of Carrier or Nelson, there is a dispute; Smith testifying that it was at the instance of Nelson alone, and for the purpose of relieving Nelson from the payment of taxes on the mortgage, and Nelson affirming that it was at the instance of Carrier, and that the mortgage was given to Smith solely by arrangement between him and Carrier. But however this may be, the mortgage was delivered to Smith, not to Nelson, and so remained in his possession until September 2, 1895, when it was assigned by Smith to B. F. Fish. Before the maturity of the note, Nelson indorsed it to the Baker-Boyer National Bank of Walla Walla as security for the payment of a loan made to him by the bank, and subsequently the mortgage came into the bank's hands, and on September 18, 1895, it instituted a suit against the Carriers and Smith and others, but not making Nelson a party, to foreclose, and later obtained a decree against the Carriers and Smith for the amount due on the note, and for a sale of the mortgaged property. The sale having been had, and the proceeds applied, there was left a large deficiency under the decree due from the Carriers and Smith to the bank, which decree was assigned by the bank to Nelson. Smith alleges in the present suit that, at the time the mortgage was assigned by him to Fish, Nelson agreed to indemnify him against the payment of the note, or

any part thereof, as a condition and consideration for such assignment, and based upon this agreement, principally, he seeks to have the decree canceled as against him as a cloud upon the title to his realty, and to enjoin its enforcement by execution and order of sale.

1. The evidence shows to our entire satisfaction, that such an agreement was entered into in writing, although it has since been lost. Smith testifies to it, giving a clear statement concerning it; and one of the subscribing witnesses corroborates him to the extent that two instruments were executed at the time the assignment of the mortgage was made to Fish—one by Smith to Fish, and another executed by Nelson to Smith—the purport of which he could not state. Nelson denies emphatically that he ever agreed to indemnify Smith against the payment of the note, or that he ever entered into any writing to that effect, but we think he must be mistaken. The inherent nature of the transaction is in refutation of his testimony, and subsequent transactions between him and Smith tend strongly to discredit him, so we are convinced that Smith's rendition of the transaction is the true one.

2. Now, in the light of these facts, is plaintiff entitled to recover by the form of suit instituted? and this presents about the only legal question involved.

It seems to be insisted by Nelson, who is the appellant here, that the suit is in the nature of a bill of review to impeach the proceedings in the Baker-Boyer National Bank suit against the Carriers and Smith to foreclose, and that it cannot be maintained under the facts. But such, in our opinion, is not the nature of the case. A bill of review, under the old practice, was employed to revise or modify a decree that had been signed and enrolled, and this for errors in law apparent upon the face of such decree, or on account of newly discovered facts, unknown to the parties seeking relief at the time of the rendition of the decree, and which could not by the exercise of due diligence have been ascertained or then utilized: 2 Beach, Mod. Eq. Prac. § 852; Bouvier, Dict. tit. "Bill of Review"; *Griggs v. Gear*, 3 Gilman (Ill.), 2; *Smythe v. Fitzsimmons*, 97 Ala.

451 (12 South. 48, second case). This form of suit is now abolished by our statute (B. & C. Comp. § 391), but an original suit may be maintained to set aside a decree for any of the causes that would formerly have sustained the bill of review: *Crews v. Richards*, 14 Or. 442 (13 Pac. 67); *Hilts v. Ladd*, 35 Or. 237 (58 Pac. 32). The present suit is not one to impeach the decree rendered in the original cause, but to set it aside in the hands of Nelson, an entire stranger thereto, as a cloud upon the plaintiff's title, and to enjoin him from enforcing collection against plaintiff by means of execution and order of sale.

3. The plaintiff had no defense to the note in the hands of the bank, an indorsee before maturity, nor could he have interposed any defense therein as against Nelson, because Nelson was not a party, either as plaintiff or defendant, so that plaintiff could have no relief whatever in that proceeding. But when the partially unsatisfied decree came into the hands of Nelson, plaintiff was entitled to have it satisfied, for the very good reason that Nelson had promised to indemnify him against the note upon which the decree was founded. The obligation of indemnity was one that Nelson had not fulfilled, and, if plaintiff had been compelled to pay the note or the decree to the bank, he would have had a clear remedy over against Nelson. But the decree having come into the hands of Nelson, the law does not require any such circuitry of action that plaintiff must pay to Nelson, and then resort to an action to recover back. He might, as he has done, resort at once to equity to have the decree canceled as a cloud upon his title, and as an instrument of unjust oppression in the hands of Nelson. Not having had his day in court with Nelson in the suit by the bank, he is entitled to it now, and to have the relative rights of the respective parties determined and settled.

4. The defendant further insists that the arrangement whereby the mortgage was executed was entered into for the purpose of avoiding the payment of taxes upon the mortgage. But this objection is without force, for, if there were no taxes collectible

upon the mortgage given as indemnity, the note was taxable, and the result is that there was no avoidance of taxes due the county, and therefore no fraud upon the public.

These considerations affirm the decree of the court below, and it is so ordered.

AFFIRMED.

Decided 19 December, 1904.

LITTLE WALLA WALLA IRRIG. DIST. v. PRESTON.

78 Pac. 982.

POWER OF IRRIGATION DISTRICTS OVER PRIVATE WATER RIGHTS.

1. The Oregon irrigation district law of 1895 (Laws 1895, pp. 13, 32), was intended to enable the owners of a certain class of lands to form a corporation that may construct or acquire irrigation facilities and water rights and to furnish water to the landowners of the district for irrigation purposes, but was not meant to authorize such a corporation to exercise any control over the rights or property of individuals.

EQUITY—INTEREST OF PLAINTIFF—IRRIGATION DISTRICT.

2. An irrigation district incorporated under the law of 1895, which does not own or control water, water rights, or water ditches, cannot maintain a suit in equity to determine the rights of private water owners among themselves or to enforce any regulations as to the use of the water, it not being a party in interest.

From Umatilla: **WILLIAM R. ELLIS**, Judge.

Statement by **MR. JUSTICE BEAN**.

Suit by the Little Walla Walla Irrigation District, a municipal corporation, against O. N. Preston and others. The plaintiff is a public corporation organized under the irrigation district law of 1895 (Laws 1895, p. 13), and embraces a section of territory about two miles square, which is and was at the time of plaintiff's organization owned by sundry persons, and divided into small holdings. The Little Walla Walla River enters the district from the south, and, as it flows north through it, divides into numerous channels or branches, the waters of which were used by the landowners prior to the organization of the plaintiff for irrigation and domestic purposes, under a claim of right. The plaintiff, without acquiring by purchase, condemnation, or otherwise, any of the water rights of the settlers within its boundaries, proceeded, through its board of directors and officers appointed by it, to ascertain and determine in the manner provided in its by-laws the quantity of water to which, in its opinion, each landowner was entitled, and to designate the character of head gates, weirs, and dams which should be used

for the division and distribution of the water of the river to each parcel of land to be irrigated therefrom, and in general undertook to regulate and control the use thereof. The defendants, who are settlers within the boundaries of plaintiff district, refused to acquiesce in the division and distribution of the water as made by the plaintiff, or to comply with its rules and regulations in reference thereto, but claimed the right to a larger quantity than that allowed them by it. This suit was thereupon commenced to enforce the orders and decisions of plaintiff as to the distribution and division of the water to the defendants. The complaint was dismissed, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Stillman & Pierce*, with an oral argument by *Mr. Alphonso Derwin Stillman*.

For respondents there was a brief over the name of *Hailey & Lowell*, with an oral argument by *Mr. Stephen Arthur Lowell*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. Conceding, for the purpose of the present suit, the right of the State, through an executive officer or board, to determine the extent of the water rights of its citizens, and to regulate and control the use thereof, and that it may delegate such power to a public corporation, we do not find any language in the act of 1895 which indicates an intention to do so. It is, in substance, a copy of the Wright Act of California, which forms the basis of the irrigation laws of the arid states: *Long, Irrig. § 135*. The constitutionality of such legislation has been assailed on different grounds, but it has been upheld by both state and federal courts: *Turlock Irrig. Dist. v. Williams*, 76 Cal. 360 (18 Pac. 379); *Central Irrig. Dist. v. De Lappe*, 79 Cal. 351 (21 Pac. 825); *In re Madera Irrig. Dist.* 92 Cal. 296; *In re Central Irrig. Dist.* 117 Cal. 382 (49 Pac. 354); *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112 (17 Sup. Ct. 56, 41 L. Ed. 369). In all the discussions concerning the validity of the law, in which some of the ablest lawyers of the United States participated, it has been assumed and taken for granted

by counsel and courts that the purpose of the corporation formed thereunder was to construct, direct, and own a system of irrigation for the lands within its boundaries, and they have been likened by the courts to corporations organized for the reclamation of swamp or overflowed lands: Long, Irrig. § 135 et seq.; 3 Farnham, Waters, § 616. It has never been contended that the law vested the power or authority in the corporation to regulate and control the use of water belonging to private individuals, or to ascertain the quantity to which they are entitled, or to settle adverse and conflicting interests between them. The purpose of the law is to make bodies of arid land, susceptible of irrigation from a common source and through the same system of works, productive by distributing water over them through canals, etc., belonging to and the property of the irrigation district.

The basal principle is the division of the arid area of the State, upon invitation of the settlers thereon, into communities or districts, which are determined by their irrigability from a common source and through the same system of works, and to invest such communities with power to raise revenue by taxation and the issuing of bonds for the purpose of acquiring water rights and constructing the necessary canals, reservoirs, and works for the distribution of the water over the lands within the district. This is indicated by its first section, which provides that when a certain number of holders of title to lands susceptible of irrigation from a common source, and by the same system of works, desire to irrigate the same, they may propose the organization of an irrigation district. It is therefore only settlers on land susceptible of irrigation in the manner indicated who can apply for the formation of the corporation, and it is for the purpose of constructing, acquiring, and owning a system of works, and the distribution of water through it, that the corporation is organized, and not for the settlement of disputes between individuals, nor for the regulation or control of water rights belonging to private persons. This is not only apparent from the first section, but from all the subsequent provisions of the law.

By sections 12, 13, and 14 (Laws 1895, pp. 13, 19, 20), the board of directors have the power to enter upon land to make surveys and to locate the necessary irrigation works, canals, etc. They may acquire by purchase or condemnation, or other lawful means, all lands, water rights, reservoir sites, and other property necessary for the construction, use, and supply, etc., of the canals and works to be purchased and constructed by the corporation. They may also construct the necessary dams, reservoirs, and works for the collection of water for the district, and do any other lawful act necessary to be done, that sufficient water may be furnished to the landowners of the district for irrigation purposes. Sections 15, 16, and 17 provide for an election to determine whether bonds shall be issued for the purpose of "constructing the necessary irrigation canals and works, and acquiring necessary property rights therefor"; sections 18 to 36, for the assessment upon all lands in the district of a tax or charge "sufficient to pay all charges and expenses, and all obligations incurred by virtue of the issuing of any bonds in and for the construction of said canal or canals and works as contemplated in this act"; section 37, that "after adopting plans for said canals, storage reservoirs and works, the board of directors shall give notice" by public advertisement "calling for bids"; and sections 38 and 39, for the manner of the payment of the bonds and the costs and expenses of purchasing and acquiring property and constructing the works and improvements, etc.—thus clearly showing that it was the object of the law to authorize the organization of a public corporation for the purpose of acquiring and owning irrigation ditches, canals, reservoirs, works, and water rights, and distributing water to the settlers within the boundaries of the district, and not to regulate the water rights belonging to private individuals. The authority vested in the board of directors to make necessary and needed by-laws for the distribution of water among the owners of the lands, and do other lawful acts necessary to be done that sufficient water may be furnished each landowner, is for the purpose of carrying out the powers granted to the corporation by the law,

and does not vest it with supervision or control over the rights of individuals.

2. It is claimed that as there are a large number of settlers within the plaintiff district entitled to the use of water from a common source, and the defendants are interfering with such use, a court of equity has jurisdiction of the subject-matter, at the suit of the plaintiff, in order to prevent a multiplicity of suits; but, since the corporation has no interest in the water or water rights which are being interfered with by the defendants, and as it has no power under the statute to regulate the use of the water belonging to private individuals, it has no interest in the controversy, and therefore no standing in court to maintain this suit.

From these views it follows that the decree of the court below must be affirmed, and it is so ordered. **AFFIRMED.**

Decided 19 December, 1904.

TINSLEY v. LOMBARD.

78 Pac. 895.

**RIGHT OF FIRST MORTGAGEE TO PLEAD STATUTE OF LIMITATIONS AGAINST
SUIT BY SECOND MORTGAGEE ON HIS MORTGAGE.**

Where a first mortgagee sued to foreclose, and joined the holder of a second mortgage as a party, and the latter did not contest plaintiff's claim nor his right of priority, but filed a cross-complaint for foreclosure of his mortgage as a subsequent lien, there was no privity between plaintiff and such second mortgagee sufficient to entitle plaintiff to plead the statute of limitations to the latter's mortgage.

From Wallowa: **ROBERT EAKIN**, Judge.

Statement by **MR. JUSTICE WOLVERTON**.

This is a suit by F. P. Tinsley against B. M. Lombard and others to foreclose a mortgage. The mortgagors suffered default, and only Lombard defended. J. C. McAllister and wife gave a mortgage to the Lombard Investment Company, providing, among other things, that the mortgagors should pay the taxes on the mortgaged premises, but if not so paid, then that the mortgagee might pay the same and add the amount thereof to the mortgage debt. Subsequently the mortgage and the obligations which it was given to secure were duly assigned and set over to the plaintiff. On the same day of the execution of plaintiff's mortgage, McAllister and wife gave two other mortgages to the

Lombard Investment Company, covering the same premises, one of them, however, including a ten-acre lot additional, which mortgages and the obligations secured thereby have since come into the hands of the defendant Lombard by due assignment and transfer. The plaintiff instituted this suit to foreclose his mortgage, making Lombard a party defendant with others. Among other allegations of the complaint is the following: "That the defendants herein have, or claim to have, some right, title, or interest in or to the said premises, the nature of which is to plaintiff unknown; but whatever the same may be, it is inferior in right, and subsequent in time, to the mortgage lien of this plaintiff upon said premises." Without denying or in any manner controverting any of the allegations of the complaint, Lombard interposed two further and separate answers, which he denominates "cross-complaints," setting up his mortgages, which he prays shall be declared liens upon the premises described in plaintiff's mortgage, second, subsequent, and subject to such mortgage, but a first lien upon the ten-acre lot not included therein; that defendant's said mortgages be foreclosed; and that the equities of the parties be adjusted, and the assets marshaled accordingly. Plaintiff demurred to these answers on the ground that defendant had not commenced his suits to foreclose within the time limited by the Code of Civil Procedure, which demurrers were sustained, and, defendant refusing to plead further, a decree was entered for plaintiff, foreclosing all right or interest of the defendant in the premises comprised in plaintiff's mortgage, from which he appeals. The case was submitted under the proviso of Rule 16: 35 Or. 587, 600. REVERSED.

For appellant there was a brief over the name of *Daniel W. Sheahan*.

For respondent there was a brief over the name of *James A. Burleigh*.

MR. JUSTICE WOLVERTON delivered the opinion.

The question involved is whether the plaintiff is in a position to set up the statute of limitations as a bar to defendant's foreclosures. The defendant is not controverting any right that plaintiff is seeking to maintain, but is aiming only to have his

mortgages foreclosed in the same suit with the plaintiff's, completely subordinating his alleged liens upon the premises described in plaintiff's mortgage, and his rights thereunder, to those of the plaintiff. So that, as to the right of priority of liens, whether for the principal sums or for interest, or for taxes paid, there is absolutely no dispute or contest. Such being the case, plaintiff cannot make use of the statute of limitations to cut off defendant's rights of suit. The right to interpose the statute of limitations is a privilege, personal to the debtor, that may be availed of by others only when they stand in the relation of privity of estate to the debtor, as a subsequent purchaser or incumbrancer of the legal title, or are in privity with the claim or demand, or have succeeded to or may be said to occupy the place of the debtor, as executor or administrator, and the like. And the pleader must show that it is a bar as between the parties to the debt. Certainly no person who is not injured by the enforcement of the demand can be heard to insist upon the plea: 2 Pingrey, Mortgages, § 1575; Wood, Limitations (3 ed.), § 41; *Grattan v. Wiggins*, 23 Cal. 16; *Coster v. Brown*, 23 Cal. 142; *Cartwright v. Cartwright*, 68 Ill. App. 74; *Board v. Presbyterian Church*, 19 Wash. 455 (53 Pac. 671); *Ewell v. Daggs*, 108 U. S. 143 (2 Sup. Ct. 408); *Sanger v. Nightingale*, 122 U. S. 176 (7 Sup. Ct. 1109); *Blair v. Silver Peak Mines* (C. C.), 84 Fed. 737; *Hanchett v. Blair*, 100 Fed. 817 (41 C. C. A. 76). Now, the plaintiff here sustains no such relation to the defendant appealing, nor is he in privity with the claims or demands that defendant is seeking to have declared liens upon the premises involved. But conceding, as defendant does, that plaintiff's lien is prior and superior in time and right to his, the plaintiff cannot, through the right of the debtor, bar the defendant's right of foreclosure in this suit. The decree of the circuit court will therefore be reversed, the demurrers overruled, and the cause remanded for such other and further proceedings as may seem proper.

REVERSED.

Argued 1 March, decided 14 March, 1904.

STATE v. HOUGHTON.

75 Pac. 822.

LARCENY FROM THE PERSON—ASSAULT—LESSER OFFENSE.

1. Under an information charging an attempt at larceny from the person by assaulting and pocket picking a conviction of simple assault is permissible, under Section 1418 of B. & C. Comp.* Whether an assault is necessarily included in an attempt at larceny from the person is not decided.

PUNISHING LARCENY BY CONFINEMENT WITH HARD LABOR.

2. Under a statute prescribing a penalty of imprisonment in jail (such as Section 1772, B. & C. Comp.), a further condemnation to hard labor is illegal.

INFORMATION—SURPLUSAGE.

3. In construing a sentence of imprisonment accompanied by "hard labor," this additional penalty cannot be rejected as surplusage, as it is a definite qualification of the judgment pronounced, and its rejection will materially change the punishment.

POWER OF SUPREME COURT TO CORRECT CRIMINAL JUDGMENT.

4. A conviction being regular, a defendant is not entitled to a new trial because of a material error in punishment, but the case should be remanded to the lower court to impose a lawful sentence. The supreme court cannot correct the judgment, but it may direct the trial court to enter an authorized judgment.

From Multnomah: JOHN B. CLELAND, Judge.

Charles Houghton appeals from a judgment sentencing him for assault.

REVERSED.

For appellant there was an oral argument by *Mr. Wilson T. Hume*, with a brief to this effect.

I. In this case the crime charged consisted of two elements, the criminal intent to steal from the person of another, accompanied by the overt act of placing his hand in the pocket of such other. Both these must be proved. The jury found a verdict of simple assault, which is a distinct crime not charged in the information. If the assault of which he was convicted was the thrusting of his hand into the pocket of the complaining witness, then the verdict should have been guilty as charged; but if it was some other act, then he was convicted of an act with which he was not charged: 3 Enc. Pl. & Pr. 98; *Graham v. People*, 181 Ill. 477 (47 L. R. A. 731, 55 N. E. 177).

II. In addition to the punishment prescribed by Section 1772, B. & C. Comp., the court added the element of "hard labor."

*Section 1418, B. & C. Comp., reads as follows:

"In all cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged," etc.

This part of the sentence is illegal and requires a reversal of the judgment: *Fitzgerald v. State*, 4 Wis. 395; *In re Johnson*, 46 Fed. 477; *Harman v. United States*, 50 Fed. 921; *Woodruff v. United States*, 58 Fed. 766; *In re Christian*, 82 Fed. 199; *Gardes v. United States*, 87 Fed. 172; *Ex parte Karstendick*, 93 U. S. 399; *Ex parte Wilson*, 114 U. S. 417; *In re Mills*, 135 U. S. 262; *State v. Ryden*, 36 La. Ann. 294; *State v. Hyland*, 36 La. Ann. 799; *People v. Keely*, 97 N. Y. 212; *Ex parte Cox*, 32 Pac. 197; *Ex parte Baldwin*, 60 Cal. 432; *Ex parte Bernent*, 62 Cal. 524; *Ex parte Kelly*, 65 Cal. 155.

III. Some federal courts have held that the judgment may be modified by striking out the words "at hard labor"; this court has no such power, it can only revise the decisions of circuit courts: Const. Or. Art. VII, § 6; *Boone v. McClane*, 2 Or. 331.

For the State there was an oral argument by *Mr. Arthur C. Spencer*, with a brief over the names of *Andrew M. Crawford*, Attorney General, *John Manning*, District Attorney, and *A. C. Spencer*, to this effect.

1. We agree with counsel that to accomplish the crime of attempted larceny from the person, two elements must be established by the State, viz, a felonious intent coupled with an overt act by means of which the plan of the thief could be carried to a successful conclusion. We contend in this case the overt act was the provoking and carrying on of a fistic encounter in the midst of which the thief, seeing his victim off his guard, by stealth attempts to take his victim's belongings. We confess that after a careful search and examination of text-books and digests we are unable to afford the court any cases analogous to the one here in question, but are confident that where the "assault" is charged in the information and no demurrer interposed on the ground of duplicity, the court will not disturb a verdict which finds that the assault was made as alleged, but that no larceny was, in fact, intended. The crime of which the appellant stands convicted is charged in the information, and hence the case comes within Section 1418, B. & C. Comp.

2. Tacking the words "at hard labor" to the sentence imposed was not reversible error, if it was error at all. The words

complained of did not vary the mode of punishment inflicted, it being at the worst only superfluous: B. & C. Comp. §§ 4864, 4865; *Brown v. State*, 74 Ala. 478; *Dodge v. State*, 24 N. J. Law, 455; *People ex rel. v. Baker*, 89 N. Y. 461; *Murrah v. State*, 51 Miss. 675; *Weaver v. Commonwealth*, 29 Pa. St. 445; *Ex parte Shaw*, 7 Ohio St. 81 (70 Am. Dec. 55); *Ex parte Mooney*, 26 W. Va. 36 (53 Am. Rep. 59); *Miller v. State*, 2 Kan. 174.

3. This court can correct the judgment complained of if it is deemed erroneous: *State v. Steele*, 50 Tenn. (2 Heisk.) 135; *Thomas v. State*, 31 Tex. Cr. Rep. 82; *Sledd v. Commonwealth*, 19 Gratt. 813.

MR. JUSTICE WOLVERTON delivered the opinion.

. The defendant, having been charged with an attempt to commit the crime of larceny from the person, was convicted upon trial of simple assault, and sentenced to imprisonment in the county jail, "at hard labor," for a period of six months. He complains, first, of the conviction, and, second, of the sentence.

1. As to the first, he insists that the crime of simple assault is not necessarily included in a charge of an attempt to commit the crime of larceny from the person, and therefore that he was unlawfully convicted. It is difficult to conceive how larceny from the person could be accomplished without an assault. An attempt to commit larceny from the person might or might not be accompanied with an assault, but the difficulty of its inclusion with the larger offense is obviated here, as the information charges that the defendant assaulted the prosecuting witness, and thrust his hand in the witness's pocket with the intent to steal, take, and carry away from his person the money and chattels, if any such he should find. The crime as alleged could not have been committed without at the same time committing an assault upon the person, and hence the latter, being the lesser offense, was necessarily included in the former.

2. The second complaint is certainly not without merit. The defendant having been convicted of simple assault, he was punishable only by imprisonment in the county jail or by fine: B. & C. Comp. § 1772. In this case the court went further than the statute permits. It condemned the defendant to hard labor,

as well as imprisonment, thereby adding something of material moment to the penalty prescribed by the statute. This was error.

3. Nor can the words "at hard labor" be treated as mere surplusage. They have a distinct meaning, and qualify the judgment rendered. If they are stricken out, we have a different judgment from the one pronounced; and, if they stand as rendered, the judgment is unwarranted.

4. We cannot make the correction here, but we can remand the cause to the trial court for that purpose: *State v. Marple*, 15 Or. 205 (14 Pac. 521). The conviction being regular, the defendant is not entitled to a new trial, but he is entitled to a proper judgment upon the conviction had.

The judgment entered will therefore be reversed, and the cause remanded to the court below, with directions to pass such sentence as the law authorizes.

REVERSED.

Decided 19 December, 1904.

MAYNARD v. OREGON RAILROAD CO.

78 Pac. 933, 68 L. R. A. 477.

CARRIERS—MENTAL SUFFERING AS AN ELEMENT OF DAMAGE.

1. In actions for damages resulting from injuries caused by negligence, mental suffering from the same cause that produced the injury is an element of damage; but mental distress caused by a realization of resulting physical inability to properly care for and educate those dependent on the person injured is not proper to be considered as an element of consequential damages.

CARRIERS—EVIDENCE AS TO FAMILY OF INJURED PERSON.

2. In an action for personal injuries, evidence as to the number and ages of the members of plaintiff's family is not admissible.

PHOTOGRAPHS OF A RAILROAD WRECK AS EVIDENCE.*

3. In an action for injuries to a passenger, received in a collision of railroad trains, photographs of the scene of the wreck taken the next morning after the accident, and before the conditions have been materially changed, are admissible to show the force of the collision.

*NOTE.—See the following annotated cases on the use of photographs as evidence: *Dyson v. New York & N. Eng. R. Co.* 14 Am. St. Rep. 82, 87; *Kansas City, M. & B. R. Co. v. Smith*, 24 Am. St. Rep. 753, 755; *Beardslee v. Columbia Township*, 68 Am. St. Rep. 883, 886; *Baustian v. Young*, 75 Am. St. Rep. 462, 468-479; *Dedericks v. Salt Lake City R. Co.* 35 L. R. A. 802-815; *Livermore F. & Mach. Co. v. Union C. & Storage Co.* 53 L. R. A. 482; *Selleck v. City of Janesville*, 47 L. R. A. 691, 76 Am. St. Rep. 892; *State v. Miller*, 43 Or. 326.

See, also, an article in 60 Cent. Law Jour. 406, Photographs as Evidence.
REPORTER.

PLEADINGS AND PROOFS—ALLEGING INJURIES.

4. In an action for personal injuries, plaintiff cannot recover for a mere aggravation of a previously received injury, without alleging such aggravation in his complaint.

INSTRUCTION AS TO NEGLIGENCE NOT PLEADED.

5. Where the complaint in an action for injuries to a passenger alleged negligence in the operation and management by defendant of its passenger and freight trains, an instruction as to the duty of a carrier of passengers "in keeping its passenger trains and appliances in a safe condition" is erroneous.

From Union: ROBERT EAKIN, Judge.

Statement by MR. JUSTICE WOLVERTON.

This is an action by H. Maynard for a personal injury alleged to have been caused by the negligence of the Oregon Railroad & Navigation Co., its agents and employees, in suffering and permitting a moving passenger train of cars, upon which plaintiff was being carried as a passenger, to come into collision with a freight train. Plaintiff secured a verdict and judgment in the circuit court, and defendant appeals. A judgment for plaintiff was reversed on a previous appeal. REVERSED.

For appellant there was a brief over the names of *William W. Cotton*, *Thomas H. Crawford*, and *James G. Wilson*, with an oral argument by *Mr. Wilson*.

For respondent there was a brief and an oral argument by *Mr. Leroy Lomax*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

The first question which is brought to our notice arises from the admission of certain testimony, and the next from the refusal of the court to take from the jury certain other testimony on motion of the defendant. The plaintiff, a witness in his own behalf, testified, among other things, in substance, that, while riding on a passenger train of the defendant, in a small room in the front end of the first passenger coach back of the baggage car, and when getting on his feet, a collision occurred between said train and a freight train, whereby he was thrown against some hard substance and fell to the floor; that it seemed to him his whole body struck something; that in falling his leg was skinned, and his hip and back bruised; that the first thing he felt, that he could recall, was a sharp pain in the small of his back; that he felt numb and once in a while a little pain

in the back; that he has always suffered since that time, sometimes worse than others. Whereupon he was asked: "Now, tell the jury, Mr. Maynard, as near as you can, how you have suffered since that time—what, if any, pains have you had, and matters of that kind?" Which question he answered, over objection, as follows: "Well, I always had pains in my back and head, more or less, and my limbs have cramped and run down, weak—no strength any more." After this he told of his previous condition of health, his ability to work, and the services in which he had been employed, when he was asked: "Have you a family, Mr. Maynard?" Another objection was here interposed and overruled, and he answered: "I got a little girl, is all but what's growed up." The inquiry proceeded: "Q. How is that? A. My family is all growed up but one little girl. Q. How old is this little girl you speak of?" His answer was, over objection: "She is thirteen. Q. Is which? A. Thirteen years old. Q. Is she dependent upon you, Mr. Maynard, for her support?" Here the objection was sustained. Witness was then asked: "Mr. Maynard, what, if any, mental suffering or agony have you sustained or had since the injuries that you received down here?" And he was allowed, over objection, to continue: "Well, I suffered distress a good deal when I realize in my condition. I am not able to work, and it distresses me to think about my little girl, and how I am going to support her and educate her and raise her up. Those are the matters that distress me." Then followed a motion to strike out the whole of the answer last given, as immaterial, irrelevant, and not responsive to any issue in the case, and as calculated to unduly prejudice the minds of the jury against the defendant, which was denied. Based upon these premises, the defendant insists that the court erred (1) in permitting the plaintiff to testify that he had a little girl thirteen years old, because it is apparent that the only object plaintiff had in inquiring concerning her was to show that she was dependent upon him for support, which could not properly be considered as an element of damages in the case; and (2) in refusing to take the last answer of the witness from the consideration of the jury, because the distress or mental anguish plaintiff suf-

ferred on account of his own condition, in not being able to work and earn a livelihood, or on account of his little girl, in not being able to support and educate her, were also not proper elements of damages upon which to base a recovery against the defendant. We will discuss these alleged errors in their inverse order, as counsel have so discussed and presented them.

1. It is undoubtedly true that one suffering from injuries to his person, due to the negligence of another, may recover for mental distress and anguish resulting from the same cause: *Cooper v. Mullins*, 30 Ga. 146 (76 Am. Dec. 638); *Hannibal & St. Jo. R. Co. v. Martin*, 111 Ill. 219, 232; *City of Chicago v. McLean*, 35 Ill. App. 273; *Ferguson v. Davis County*, 57 Iowa, 601, 609 (10 N. W. 906); *Kendall v. City of Albia*, 73 Iowa, 241, 245 (34 N. W. 833); *Kenyon v. Gilmer*, 131 U. S. 22, 26 (9 Sup. Ct. 696). Such mental distress or anguish, however, as is not the natural result of the accident, but is produced by the operation of the mind in the contemplation of the physical condition to which the injured party is reduced, or in contemplation of any extraneous suffering or inconvenience that such condition might entail, whether it respects the person himself, or others dependent upon him, is not regarded as matter proper to form the basis of consequential damages. The doctrine is enunciated in *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313, 320, in the following language: "It is the mind that either feels or takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury, unless the mind is overpowered and consciousness is destroyed. The mental anguish which would not be proper to be considered is where it is not connected with the bodily injury, but was caused by some mental conception not arising from the physical injury." So, anguish of the mind, wholly sentimental, arising from the contemplation of a disfigurement of the person, cannot be considered for the purpose of swelling the damage. The reason for the rule is forcibly stated in *Chicago, B. & Q. R. Co. v. Hines*, 45 Ill. App. 299, as follows: "The law regards supposed injuries to sentimental feelings of this character as too remote and speculative to allow it as an element of damages in cases where no

malice exists." Of like character is *Augusta & S. R. Co. v. Randall*, 85 Ga. 297 (11 S. E. 706); *Giffen v. City of Lewiston*, 6 Idaho, 231 (55 Pac. 545); and *Chicago, R. I. & P. R. Co. v. Caulfield*, 63 Fed. 396 (11 C. C. A. 552).

The same principle was controlling in *Planters' Oil Co. v. Mansell* (Tex. Civ. App.), 43 S. W. 913, where the injured party was permitted by the trial court to show, over objection, that he was greatly annoyed and suffered mental anguish from the fact that the month's rent of six dollars on his house would soon be due, and that he had just that amount with which to pay it; the appellate court saying: "The mental anguish which the appellee experienced on account of the fact that his house rent would soon be due, which he would be unable to meet, and which (such is the implication) would result to the inconvenience or suffering of his family, does not naturally result from the injury." So it was also said in *Linn v. Duquesne Borough*, 204 Pa. 551 (54 Atl. 341, 93 Am. St. Rep. 800): "Mental suffering has not generally been recognized as an element of damages for which compensation can be allowed, unless it is directly connected with a physical injury, or is the direct and natural result of a wanton and intentional wrong. Where a claim is for mental suffering that grows out of or is connected with a physical injury, however slight, there is some basis for determining its genuineness and the extent to which it affects the claimant. But as the basis of an independent action, mental suffering presents no features by which a court or jury can determine either its existence or its extent, and claims founded on it have generally been regarded as too uncertain and speculative for consideration." In this case the instruction on the measure of damages permitted the jury to consider, in addition to the physical and mental suffering caused by the injury, and the permanent disability arising from it, the humiliation and regret that plaintiff might thereafter feel because of her inability to attend to her household duties, and to perform the services for her husband that she had been wont to perform, and there was a reversal on account of it. Again, in *Atchison, T. & S. F. Co. v. Chance*, 57 Kan. 40 (45 Pac. 61, 62), it was said, which lan-

guage indicates the state of the case also: "The court erred in refusing to strike out the testimony to the effect that Finnegan was troubled by the sickness and confinement of his wife, and the fear that he would leave her and the child in a dependent and helpless condition. Under the decisions of this court, a recovery may be had for mental suffering or anguish of mind resulting from physical pain and suffering endured by the injured party; but it is improper to admit evidence as to mental suffering on account of the circumstances or condition of others." A like ruling was made in *Texas Mex. Ry. Co. v. Douglass*, 69 Tex. 694 (7 S. W. 77) upon a similar state of facts as appears in this last case. See, also, *City of Parsons v. Lindsay*, 26 Kan. 426.

Now, in regard to the matter which it was sought to have withdrawn from the jury, there are two features involved: First, the witness says, in effect, that he suffered a good deal of distress by realizing his condition that he was not able to work. This related to his mental suffering, as he was asked about that, but it was not such as would naturally result from his physical infliction. It arose by reason of the consideration or mental deduction that his infliction rendered him unable to work—a cause arising independently of the injury sustained. The fact that he was rendered incapable of pursuing his labors was a condition entirely legitimate for swelling the damages, but his meditation upon that fact, and the mental distress and anguish produced from such meditation, would be wholly aside from and independent of any suffering caused by the accident or the physical infliction received; and, as the authorities say, it is too remote, speculative, and uncertain upon which to base an estimate of damages.

The other feature consists in the distress that it caused him when he thought of his little girl and how he was going to support and educate her, and it needs no further remark to show that this is extraneous of any distress of mind arising from the injuries received. So we conclude that the trial court erred in not withdrawing the witness's answer from the consideration of the jury.

2. We are of the opinion, also, that it was error to permit an examination as to the family of the plaintiff. It could not enhance his damages in the least that he had a little girl of thirteen years to support, and the only tendency of such evidence would be to appeal to the sympathies of the jury in behalf of the plaintiff, and could not prove otherwise than prejudicial to the defendant: *Louisville & N. R. Co. v. Binion*, 107 Ala. 645 (18 South. 75); *Quincy Horse R. Co. v. Omer*, 101 Ill. App. 155; *Mahaney v. St. Louis, etc., R. Co.* 108 Mo. 191 (18 S. W. 895); *Sesler v. Rolfe Coal Co.* 51 W. Va. 318 (41 S. E. 216); *Kreuziger v. Chicago & N. W. R. Co.* 73 Wis. 162 (40 N. W. 657); *Louisville & N. R. Co. v. Collinsworth* (Fla.), 33 South. 513; *Ft. Worth Ironworks v. Stokes* (Tex. Civ. App.), 76 S. W. 231; *Baltimore & Ohio R. Co. v. Camp*, 81 Fed. 806 (26 C. C. A. 626); *Pennsylvania Co. v. Roy*, 102 U. S. 451. While, if this latter error stood alone, we might be inclined, in the light of the circumstance that the court refused to allow the inquiry to proceed as to whether the girl was dependent upon him for support, to view it as harmless; but, when considered in connection with the error just discussed, it might have been that the jury was unduly influenced by it, and hence for these two errors the judgment of the circuit court must be reversed.

Plaintiff's counsel insists, however, that, as the instruction of the court touching the question of damages was unexceptionable, the jury could not well have been misled by the testimony complained of, and therefore that the error in admitting it, if error at all, was harmless; but the court having been especially requested to withdraw the objectionable matter, its refusal must have impressed the jury that it was proper for their consideration, and, being deemed proper when it was not, we must assume that they allowed it to have some weight in their deliberations.

3. It is further insisted that the court erred in admitting certain photographs taken of the scene of the wreck the next morning after the collision occurred. The wrecker had been at work clearing up the track, and the conditions were somewhat changed from those which obtained when the collision took place, and it is objected for this reason that the photographs

were not admissible. They were introduced in evidence for the purpose of showing the great force of the collision or impact resulting from the coming together of the trains, and, while they were not taken at the exact time, the conditions had not so materially changed as to render them incompetent as evidence for the purpose. The situation could not be so well demonstrated or explained as it could be by the use of the photographs, and we think they were not improperly introduced: *Dederichs v. Salt Lake City R. Co.* 14 Utah, 137 (46 Pac. 656, 35 L. R. A. 802); *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307 (80 N. W. 644).

4. Another question is raised touching the basis of plaintiff's recovery—whether it should be for the injury alleged to have been sustained, or whether, failing in that, plaintiff could recover for an aggravation of a disability arising from a previous injury. We will indicate our view without an extended discussion of the subject. The plaintiff should be confined to the injuries alleged for his damages. He may have received previous injuries. For these he cannot recover in this action, and, if the injuries now sustained are a mere aggravation of those previously received, he cannot recover therefor, because he has not so alleged in his complaint. That would be a different cause of action from that which he has now preferred. But if the injuries of which he complains are the direct result of the collision, then he may recover, notwithstanding it may have aggravated some former infirmity, provided such former infirmity is not the same as that of which he complains; that is to say, having alleged that the injuries received were bruises on the leg and a wrench of the back and spine, producing severe contusions of the muscles and nerves, etc., he cannot recover for lumbago or rheumatism previously contracted or produced by other injuries received, or for an aggravation thereof produced by the present accident, but must recover upon the strength of his own allegations: *Wilkinson v. Detroit S. & Spring Works*, 73 Mich. 405 (41 N. W. 490). The subject seems to have been fairly covered by proper instructions in the charge. It was not error, therefore, to refuse defendant's requested instructions Nos. 2 and 8 in the

record. We are not saying by this that such requested instructions were correct or otherwise proper, but that, under the present state of the record, they were a superfluity in any aspect in which they may be considered.

5. Another instruction given is as follows:

"The court instructs you, as a matter of law, that if there is a failure of the common carrier of passengers to exercise all the care and diligence that is reasonably practicable in keeping its passenger trains and appliances in a safe condition, then the duty of the carrier is not fulfilled, and it is liable for any injury or damage of which such neglect is the approximate cause, provided the person injured is himself using reasonable care and caution to avoid such injuries."

The defendant complains of this because the only negligence alleged in the complaint for which recovery is sought is touching the operation and management by the defendant of its passenger and freight trains, and that the duty of the company to exercise care and diligence to keep its passenger trains and appliances in a safe condition was not involved. Plaintiff must recover, if at all, for the negligence stated in his cause of action, and will not be permitted to allege negligence in one respect and to recover for such as the company might have been guilty of in another. Any other rule would lead to interminable surprises and consequent injustice. It is plain that the instruction permitted a recovery for negligence not alleged, and was therefore error.

Many other errors are assigned, but, as the questions involved may not arise at another trial, it is unnecessary to discuss them now. At the close of the trial, however, defendant asked for a directed verdict in its favor on the ground that plaintiff had failed to connect his condition at the time of the trial with the alleged collision as the cause of such condition. Without reviewing the testimony, suffice it to say that it was ample upon this subject, as indicated by such as has been noted, to carry the case to the jury, and a directed verdict would have been improper.

The judgment of the circuit court will be reversed, and the cause remanded for such other proceedings as may seem proper, not inconsistent with this opinion.

REVERSED.

Decided 9 January, 1905; rehearing denied.

STATE v. GRAY.

79 Pac. 53.

SCOPE OF CROSS-EXAMINATION—EXAMPLE.

1. A witness who has testified on direct examination only as to being present when a certain dying declaration was made and written out, and as to his having signed it as a witness, cannot be cross-questioned as to whether the writing contained all that was said by deceased on that occasion.

INSTRUCTIONS CONSIDERED AS A WHOLE.

2. Objections to parts of a charge ought not to be sustained if, taken as a whole, the charge fairly states the law as applied to the facts of the case.

HOMICIDE—SELF-DEFENSE AFTER PROVOKING QUARREL.

3. The law of self-defense cannot be invoked by one who has provoked the fatal encounter, unless he subsequently, in good faith, endeavored to withdraw.

SELF-DEFENSE—AVOIDING DANGER—RETREATING.

4. A person at a place where he may lawfully be, if not the aggressor in a conflict, is not obliged to retreat from the assailant, but he should make such reasonable efforts to avoid taking life as are consistent with his own safety.

REFUSING INSTRUCTIONS ALREADY GIVEN.

5. It is not error to refuse to give requested instructions the substance of which has already been given.

OBJECTION TO IMPROPER BUT FAVORABLE INSTRUCTION.

6. An objection to an instruction as inapplicable to the case will not be considered where the instruction was favorable to the objecting party.

EFFECT OF INSTRUCTION AS TO USE OF DEADLY WEAPON.

7. An instruction that "an intent to murder is conclusively presumed from the deliberate use of a deadly weapon, causing death within a year, if not done in self-defense or in the rightful and necessary defense of property," did not impose on defendant the burden of showing that the killing was in self-defense.

From Union: ROBERT EAKIN, Judge.

Woodson Gray appeals from a second conviction of the crime of manslaughter.

AFFIRMED.

For appellant there was a brief over the names of *J. D. Slater* and *Crawford & Crawford*, with an oral argument by *Mr. Slater* and *Mr. Thomas H. Crawford*.

For the State there was a brief over the names of *Andrew M. Crawford*, Attorney General; *Leroy Lomax*, District Attorney, *Samuel White* and *Neil C. McLeod*, with an oral argument by *Mr. Crawford* and *Mr. White*.

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant was indicted for murder in the first degree for killing one A. M. Halgarth, in March, 1903. He was convicted of manslaughter, but upon appeal the judgment was reversed:

State v. Gray, 43 Or. 446 (74 Pac. 927). He was retried and again convicted of the same crime, and from the judgment entered thereon he brings this appeal.

There was evidence for the State tending to show that, on the morning of the killing, the defendant, accompanied by his son Wade, a lad about fourteen years of age, was going along the public highway by the deceased's house on his way to the neighboring school for the purpose of having his son, who had been suspended because of a difficulty between him and the children of the deceased, reinstated and readmitted to the school. In place of traveling in the beaten way on the north side of the road, he walked along and over the rough and frozen ground on the south side—the one nearest the house of the deceased—and while passing the house was seen to be looking in that direction, as if watching for some one. After he had passed the house a short distance, the deceased, who was in the field near by, hailed him and started toward the road fence. As he approached the fence he said: "Gray, are you going to the schoolhouse?" and the defendant replied: "I am going to the schoolhouse to clear up those s—— of b—— of lies you told the teacher." The deceased then started to get over the fence, when the defendant said, "Come on; I am fixed for you," and drew a revolver. The deceased came over the fence and started toward the defendant, saying, "I told no untruth." During all this time the defendant was cursing and abusing the deceased and his family, calling him a black s—— of a b——, a liar, and using other abusive and insulting language. After crossing the fence, the deceased continued to approach the defendant, who, in the mean time, continued his abusive and insulting language and threatening attitude, and when he got near enough he attempted to seize the arm of the defendant by which he held the revolver, but before he could do so was shot through the body by the defendant. Two or three more shots were fired in rapid succession, when the deceased grappled with the defendant, threw him down, and took the revolver from him. While he had the defendant down, endeavoring to take the revolver from him, defendant called to his son to take his knife and kill the "s—— of a b——." The boy,

in obedience to the order of his father, stabbed the deceased several times in the back, when he got up and started to move away, but, after taking a few steps, fell, and on the succeeding day died from the effects of the gunshot wound. During the difficulty the defendant said to his son: "I wish I had killed him, Wade."

1. This evidence is principally from the dying statement of the deceased, and is contradicted in many particulars by the testimony of the defendant and his son, but for the purposes of this opinion it must be taken as true. After making the necessary preliminary proof, the dying declaration of the deceased, which had been reduced to writing and subscribed by him and witnessed by the attending physician and J. T. Chandler, was admitted in evidence. Chandler was called by the State, and testified that he was present at Halgarth's house from about ten o'clock on the morning of the shooting until the deceased died, on the following day, and that he signed the dying declaration as a witness. On cross-examination he said that he was present in the room all the time while the dying statement was being reduced to writing by the physician. He was thereupon asked: "Well, now, does that statement taken down there by Dr. Whiting, does that contain all Mr. Halgarth stated there during that time?" To this question an objection was made and sustained, because it was not proper cross-examination. The court informed counsel at the time that they might make the witness their own if they so desired, but counsel refused to do so, and now insist upon the ruling as error.

The limit and scope of a proper cross-examination has been so often discussed by this court that it is unnecessary to enlarge upon the subject at this time. It has been held that it must be limited to the matter stated by the witness in his direct examination, or properly connected therewith, and that a witness cannot upon cross-examination be questioned with regard to that which does not impeach, rebut, explain, or modify, or in some way qualify, something he has testified to in chief. He can only be examined as to other matters by the examining party making him his own witness: *Goltra v. Penland*, 45 Or. 254 (77 Pac. 129); *Ah Doon v. Smith*, 25 Or. 89 (34 Pac. 1093); *State v.*

Savage, 36 Or. 191 (60 Pac. 610, 61 Pac. 1128); *Williams v. Culver*, 39 Or. 337 (64 Pac. 763). Now, the only evidence given by Chandler on direct examination was that the writing was executed by Halgarth and signed by him as witness. It was upon this subject only, or matters properly connected therewith, that he could be cross-examined. If counsel desired his testimony as to whether the dying declarations of the deceased were truly stated in the writing, they should have made him their witness for that purpose, and could not obtain the information by a cross-examination.

2. The defendant sought to justify his act in killing Halgarth upon the ground that it was done in necessary self-defense. Upon this subject the court charged, in substance, as follows:

The law gives to every man the right of self-defense. This means that a man may defend his life and person from great bodily harm. He may repel force by force, and may resort to such force as, under the circumstances surrounding him, may reasonably seem necessary to repel the attack upon him, even to the taking of the life of his assailant. If you find from the evidence that the defendant, at the time of the fatal shot or cuts, had reasonable ground to believe, and did honestly believe, that his life was in imminent danger, or that he was in danger of great bodily harm at the hands of the deceased, and not being the aggressor himself, and so honestly believing, he fired the fatal shot or inflicted the fatal wounds, he was justifiable under the law in so doing. And by "aggressor" I mean one who brings on a conflict or affray by some overt act or demonstration calculated to precipitate the difficulty or conflict.

If you find that the defendant was traveling along the public highway past the premises of deceased when the difficulty occurred, the defendant was where he had a right to be, and was not required to retreat to the wall. If a person is assaulted in such a way as to induce in him a reasonable belief that he is in actual danger of losing his life or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent. No one has a right to kill another, even in self-defense, unless such killing is apparently necessary for such defense. Before a person can justify the taking of a human life on the ground of self-defense, he must, when attacked, employ all reasonable means within his power, consistent with his safety, to avoid the danger and avert the necessity for the killing. The right of one to take the life of an

assailant in self-defense can only be exercised to defend his own life or his person from great bodily harm. Danger of a battery alone will not be sufficient. It is not necessary that the assault made by the deceased upon the defendant, if an assault was made, should have been made with a dangerous weapon. An assault by the deceased with his fists alone, if there was an apparent purpose and the ability to inflict death or great bodily harm upon the defendant, would be sufficient to justify the killing in self-defense, if the defendant, at the time he shot and killed the deceased, had reason to believe, and did believe, that he was in imminent danger of death or great bodily harm at the hands of the deceased.

Homicide can be justified or excused on the ground of necessity alone. The necessity must be apparent, absolute, and unavoidable, or the defendant must from all the circumstances have honestly believed it to be so. To excuse homicide, the party must act under an honest and well-founded belief that it is necessary to take life to prevent death or great bodily harm to himself. The danger must be so urgent that the killing is absolutely or apparently necessary, and must not have been brought on by the defendant. Imminent and apparent danger means such overt actual demonstrations as would make the killing apparently necessary to prevent death or great bodily harm. The danger must be unavoidable according to the facts and circumstances as they honestly appeared at the time to the defendant, but it is not necessary that the danger should in fact have existed at the time, if the defendant had reason to believe, and did believe, that it existed. No words of abuse can be an excuse for assault.

Objections were made and exceptions were reserved to various portions of these instructions, but when taken as a whole they fairly cover the law of self-defense as applied to the facts of this case.

3. The objection that the court erroneously assumed that there was evidence tending to show that the defendant was an aggressor is without merit. There was testimony from which the jury could have found that the difficulty was provoked and brought on by the insulting and abusive language of the defendant, and his threatening attitude in drawing his pistol before the deceased crossed over the fence into the road. If such are the facts, he could not justify the killing on the ground of self-defense, unless, after provoking the difficulty, he in good faith endeavored to withdraw from it: 1 McClain, Crim. Law, § 310.

The rule is thoroughly established that the plea of self-defense cannot be sustained when the evidence shows that the defendant was the aggressor: *State v. Hawkins*, 18 Or. 476 (23 Pac. 475). He is precluded by his conduct to avail himself of a necessity arising from a present impending peril of great bodily harm brought on himself by his own wrongful act. Sergeant Hawkins says: "Neither shall a man in any case justify the killing of another by a pretense of necessity, unless he were himself wholly without fault in bringing the necessity upon himself; for if a man, in defense of an injury done by himself, kill any person whatsoever, he is guilty of manslaughter at least": 1 *Hawkins' Pleas of the Crown*, c. 10, § 22. And Mr. Wharton says: "If the defendant in any way challenged the fight, and went to it armed, he can not afterwards maintain that in taking his assailant's life he acted in self-defense": 1 *Wharton, Crim. Law* (9 ed.), § 485. In order for a defendant to invoke the law of self-defense, he must be free from fault, and the difficulty must not have been one of his own seeking. Insulting and abusive language may be sufficient to provoke and bring on the difficulty within this rule, unless, perhaps, the assault is so violent as to be out of all proportion to the provocation given, and especially is this true when, as here, such language is accompanied by the drawing of a deadly weapon with an apparent hostile intent: 1 *McClain, Crim. Law*, § 309; *Kerr, Homicide*, §§ 178, 179; *Henry v. State*, 79 Ala. 42; *State v. Hudson*, 59 Mo. 135; *State v. Talmage*, 107 Mo. 543 (17 S. W. 990); *State v. Trammell*, 40 S. C. 331 (18 S. E. 940, 42 Am. St. Rep. 874). There is some language in *Foutch v. State*, 95 Tenn. 711 (34 S. W. 423, 45 L. R. A. 687), the case relied upon by the defendant, which would seem to imply that to deny one who provoked a difficulty, in which his adversary is killed by him, the right to plead self-defense, it must appear that he brought on the difficulty with the intent to kill his adversary or inflict on him great bodily harm. The question for decision in that case, however, was the soundness of an instruction that "if one provokes a combat or produces an occasion to kill, and kills his adversary, it is murder, no matter to what extent he (the slayer) may have been reduced in the

combat." The court held the instruction erroneous, because the killing would not be murder, under the circumstances stated, unless the difficulty was provoked by the slayer with the intent to kill his adversary or to do him great bodily harm. What is said upon the law of self-defense can scarcely be regarded as authority.

4. It is urged that the instructions are erroneous because the court told the jury that, before a person can justify the taking of a human life on the ground of self-defense, "he must take and employ all reasonable means within his power, consistent with his safety, to avert the danger and avoid the necessity for the killing," and that "the danger must be unavoidable, according to the facts and circumstances as they honestly appeared at the time to the defendant," etc. These instructions are merely the language of the books and decisions, and, when construed in connection with the remainder of the charge, it is clear the court did not intend to instruct the jury that it was the duty of the defendant, if he was without fault, to retreat or flee from his adversary in order that he might justify the killing on the ground of self-defense. On the contrary, the court plainly charged that, if the defendant was traveling in a public highway, he was where he had a right to be, and was not required to retreat; that, if he was assailed in such manner as to induce in him a reasonable belief that he was in actual danger of losing his life or of suffering great bodily harm, he would be justified in defending himself, although the danger was not real, but only apparent; that it was not necessary that the assault should have been made by deceased with a dangerous weapon, but that his fists alone were sufficient, if there was an apparent purpose and present ability on his part to inflict death or great bodily harm, and the defendant had reason to believe and did so believe; that it was only necessary that the danger be unavoidable according to the facts and circumstances as they honestly appeared at the time to the defendant. The effect of these instructions as a whole is that while the defendant, if he was not the aggressor, was not obliged to retreat or fly from his assailant, it was his duty to employ all reasonable means within his power, consistent with his own

safety, to avoid the danger, and avert the necessity of taking the life of the assailant. This is the law, and was so stated in the former opinion: *State v. Gray*, 43 Or. 446 (74 Pac. 927); *State v. Porter*, 32 Or. 135 (49 Pac. 964); 1 McClain, *Crim. Law*, § 311; Kerr, *Homicide*, § 180; *State v. Sumner*, 74 S. C. 32 (74 Am. St. Rep. 707, note).

Complaint is also made because it is said the court gave too much prominence in its charge to the fact that the defendant must not have been the aggressor, and must not have brought on the difficulty, etc.; but this is owing to the prolixity of the charge, due, probably, to the numerous instructions requested by the parties, and the evident earnest desire of the court to present the law of the case fully and clearly to the jury.

5. Again, it is insisted that the court confused "justifiable" and "excusable" homicide, but these terms are often used as synonyms in the books: 1 McClain, *Crim. Law*, § 296. No injury could have come to the defendant by their use in the case at bar. Several instructions were requested by the defense to the effect that the defendant had a right to act upon appearances, and to repel the assault of the deceased, whether it was made with a deadly weapon or not; that no person has a right to advance into a public highway and administer a merciless castigation upon his neighbor who is lawfully there, and that a strong man with his fists alone is capable of inflicting great bodily harm upon a victim much inferior in strength and endurance, and he may even thus take his life; and that in arriving at a verdict they should take into consideration the relative sizes, ages, and strength of the parties; but all these points were sufficiently covered by the general charge, and there was no error in refusing to give the instructions as requested.

6. Preliminary to its charge as to the law applicable to the facts of the case and as introductory thereto, the court stated to the jury what would constitute excusable homicide as defined by the statute (B. & C. Comp. § 1758), and that "an intent to murder is conclusively presumed from the deliberate use of a deadly weapon, causing death within a year, if not done in self-defense or in the rightful and necessary defense of property."

Objections are made to both of these instructions on the ground that the first is outside the testimony, and the second imposed the burden of proof upon the defendant of showing that the killing was in self-defense. It is a rule of law that an instruction upon a matter not in evidence, if prejudicial to the party complaining, is reversible error, but the definition here given of excusable homicide was favorable to the defendant. If any inference was to be drawn therefrom, it was that, in the opinion of the court, there was some evidence tending to show that the defendant was entitled to an acquittal on the ground that the killing was excusable under the statute, and therefore he has no right to complain.

7. The other instruction was merely stating to the jury a presumption of law declared by the statute as interpreted by this court in previous decisions, and did not, as we conceive it, in any manner shift the burden of proof: *State v. Carver*, 22 Or. 602 (30 Pac. 315); *State v. Gibson*, 43 Or. 184 (73 Pac. 333). It was an instruction which had no proper place in a trial for manslaughter, but was not prejudicial to the defendant, nor did it affect any substantial right of his.

The court at the beginning of its charge told the jury that the former verdict was an acquittal of the crime of murder in the first or second degree, and that the defendant could not on a retrial be convicted of any greater offense than manslaughter. The case was tried throughout by the State and the defense as a prosecution for manslaughter alone, and evidence was admitted and instructions of the court framed on that theory. The cause was properly and fairly submitted to the jury, and should not now be reversed because the court improperly alluded to or stated a statutory rule of evidence which was not applicable to the case, but which could not have affected the substantial right of the defendant: B. & C. Comp. § 1484; *State v. Moore*, 32 Or. 65 (48 Pac. 468).

The judgment of the court below is affirmed. **AFFIRMED.**

Decided 19 December, 1904; rehearing denied.

WALLOWA COUNTY v. OAKES.

78 Pac. 892.

FEES OF JUSTICES ACTING AS COMMITTING MAGISTRATES.

1. Under Section 1583 of B. & C. Comp., declaring justices of the peace to be magistrates, Section 1582, defining the office of magistrate, and Section 3000, fixing the fees of justices, the fees thus prescribed relate to the duties as committing magistrate under Sections 1620-1624, as well as to those of justice, so that a magistrate who has performed the services is entitled to the fees prescribed by Section 3000.

ACTION AGAINST COUNTY FOR FEES.

2. Where an officer's fees are regulated by law, and he has performed the services entitling him thereto, the county court must audit and allow his claim, and on refusal to do so an action at law may be maintained against the county to recover the sum due.

From Wallowa: ROBERT EAKIN, Judge.

Statement by MR. JUSTICE MOORE.

This is a special proceeding to review the action of an inferior court. The facts are that an information having been filed with the defendant H. E. Oakes, as a magistrate, who was then a justice of the peace of Wallowa County, charging the commission of the crime of libel, the person accused was apprehended, and brought before him, and, after hearing the proof, he concluded that the evidence produced was insufficient to sustain the charge, and released the prisoner. The warrant of arrest, depositions, and memoranda made at the examination were returned to the circuit court for that county, and there was filed with the county clerk thereof a certified bill of the fees prescribed for a justice of the peace for the performance of the services rendered, amounting to \$6.35, and claimed to have been earned by Oakes in the investigation of the charge, but the county court of that county, sitting as a board of commissioners, refused to audit or allow any part of the bill. An action was thereupon commenced by Oakes against Wallowa County in a justice's court thereof, before the defendant A. E. Cray, as justice of the peace, to recover the sum stated. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action having been overruled, judgment for want of an answer was rendered for the sum demanded, to review which these proceedings were instituted. A transcript of the action brought before Cray having been certified up to the circuit court, the writ of review was dismissed, from which judgment Wallowa County

appeals. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600. AFFIRMED.

For appellant there was a brief over the names of *Leroy Lomax*, District Attorney, and *Daniel Webster Shehan*.

For respondent there was a brief and an oral argument by *Mr. James A. Burleigh*.

MR. CHIEF JUSTICE MOORE delivered the opinion of the court.

1. It is contended by appellant's counsel that no fees are prescribed by statute for the performance of any service by a judicial officer acting as a magistrate, and, this being so, Oakes's claim therefor, when rejected by the county court, could not be made the basis of an action against the county, for which reason the trial court erred in not setting aside the judgment of the justice's court and in dismissing the writ of review. The rule is universal that the right of an officer to recover fees for the performance of a duty enjoined by law must be found in the act conferring it: *Jackson v. Siglin*, 10 Or. 93; *Pugh v. Good*, 19 Or. 85 (23 Pac. 827); *Houser v. Umatilla County*, 30 Or. 486 (49 Pac. 867). The statute regulates the fees to which a justice of the peace is entitled (B. & C. Comp. § 3000), but it is argued that they are for the discharge of judicial duties only, and that the examination of a criminal charge does not come within the class of services for the performance of which remuneration is provided. Justices' courts have jurisdiction of certain misdemeanors committed or triable in their respective counties (Laws 1903, p. 295), but the list does not include criminal libel. Though that crime is classed as a misdemeanor (B. & C. Comp. § 1778), prosecutions therefore must be by indictment (B. & C. Comp. § 1319), thereby depriving a justice of the peace of jurisdiction of the subject-matter, except to examine the case and to hold the defendant to answer or discharge him: B. & C. Comp. § 1620 et seq. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime: B. & C. Comp. § 1582. The following persons are magistrates: (1) The justices of the supreme court, (2) the judges of the circuit court, (3) the county judges and justices

of the peace, (4) all municipal officers authorized to exercise the powers and perform the duties of a justice of the peace: B. & C. Comp. § 1583. No fees are prescribed as compensation for the examination of a criminal charge by a justice of the supreme court, by a judge of the circuit court, or by a county judge, for the reason that each of these officers is paid a salary for the performance of the duties devolving upon him. A justice of the peace, however, receives no salary, but is remunerated by fees for the services required of him: B. & C. Comp. § 3000. This section of the statute declares: "The fees of justices of the peace shall be as follows: For issuing any summons, writ, warrant, process, or order, in any action or proceeding, civil or criminal," etc. The compensation prescribed by this act is not limited to the performance of duties required of that officer as justice of the peace only, but extends to the services performed by him as a magistrate. The certified copy of the bill filed by Oakes with the county clerk, as set out in his complaint in the action against Wallowa County, shows that the items thereof comply with the rate of fees prescribed for the performance of the service rendered, and it must be conceded that the examination of a charge of libel is a criminal proceeding. We think a justice of the peace, acting as a magistrate, is clearly entitled to the fees stipulated for the performance of the several duties enumerated.

2. This brings us to a consideration of the question whether or not an action at law can be maintained against a county to recover a compensation which the law has prescribed for the performance of an official duty. It must be admitted that, as a condition precedent to the right to maintain such action, the claim of the officer for the fees earned must have been presented to and rejected by the county court sitting as a board of county commissioners for the transaction of county business: *County of Union v. Slocum*, 16 Or. 237 (17 Pac. 876). The claimant's duty is fully discharged in this respect, however, when he files his bill with the county clerk, which is tantamount to a constant demand upon the auditing board to allow the sums stated. When the fees of an officer are regulated by law, and he has performed the service which entitles him to the compensation prescribed,

thereby rendering the county liable therefor, the county court has no discretion in the matter, but must audit and allow his claim; and for a refusal to do so an action at law may be maintained against the county to recover the sum demanded: *Crossen v. Wasco County*, 10 Or. 111. As analogous to the legal principle there announced and illustrative of the decision rendered, see *Grant County v. Lake County*, 17 Or. 453 (21 Pac. 447); *State v. Baker County*, 24 Or. 141 (33 Pac. 530); *Flagg v. Marion County*, 31 Or. 18 (48 Pac. 693); *Metschan v. Grant County*, 36 Or. 117 (58 Pac. 80). We think Oakes was unquestionably entitled to the fees claimed, and, as the county court refused to allow his bill therefor, an action at law against the county to recover the same was maintainable.

Other errors are asserted, but, deeming them unimportant, the judgment is affirmed.

AFFIRMED.

Decided 19 December, 1904.

SLOAN v. SLOAN.

78 Pac. 893.

LEADING QUESTION—ORDER OF PROOF.

1. In an action on a note, it was not error to sustain an objection to a question asked of plaintiff as to whether defendant's agent had authority to instruct plaintiff to credit a certain amount on the note as a part payment, before any attempt had been made to prove such alleged agency, the form of the question being also objectionable.

COMPETENT EVIDENCE OF AGENCY.

2. An agent's authority cannot be proved by his own statements that he is such agent, and before the acts of the agent can be shown at all against the principal, the agency must be shown.

AGENCY—COMPETENT EVIDENCE OF RATIFICATION.

3. Where plaintiff testified that he wrote defendant a letter, which was mailed to him in the ordinary course of the mail, informing him that plaintiff had credited a certain sum due defendant as a payment on his note to plaintiff, such evidence being sufficient to raise a presumption that the letter was received, as provided by B. & C. Comp. § 788, subd. 24, it should have been submitted to the jury as bearing on the inquiry whether defendant had ratified plaintiff's appropriation of his money in part payment of the note.

From Baker: ROBERT EAKIN, Judge.

Statement by MR. JUSTICE WOLVERTON.

This is an action by Perry V. Sloan against Benjamin Leroy Sloan to recover upon a promissory note given by the defendant to the plaintiff November 29, 1894, at Marengo, Ind., calling for \$140 one day after date, with interest at 8 per cent and attor-

ney's fees. One defense set up is that the note is barred by the statute of limitations. It appears by the bill of exceptions that at the trial, when plaintiff rested, counsel for the defendant moved for a nonsuit against plaintiff on the ground that the testimony shows that the statute of limitations has run against the note. The motion being sustained, the court thereupon directed the jury to return a verdict for defendant, which being done, judgment was rendered accordingly, and the plaintiff appeals.

REVERSED.

For appellant there was a brief over the name of *O. B. Mount*.

For respondent there was a brief and an oral argument by *Mr. John Langdon Rand*.

MR. JUSTICE WOLVERTON delivered the opinion.

Two questions are presented for our consideration. The first relates to the action of the circuit court in sustaining the objection to a question put to the plaintiff while a witness in his own behalf, and the second to that of the court in directing a verdict for the defendant.

1. The note was identified by the plaintiff, and offered and received in evidence. There appear upon the back of it the following indorsements:

"Marengo, Ind., Nov. 29, '96, rec'd on within note the sum of \$40."

"Marengo, Ind., Sept. 23rd, 1901, credited by corn, \$2."

The limitation of the action depends upon the authority that plaintiff had to make the latter indorsement. The witness having testified that there had been two payments made as indicated by these indorsements, and that the latter represented defendant's interest in a corn crop raised on his grandfather's estate, he was asked: "You simply wrote on the back of this note, 'Paid on corn \$2,' did you?" to which he answered: "He had an agent there, a brother, L. E. Sloan. There was no administrator; the heirs were all of age, and this corn crop—" But seemingly before he had completed his answer he was again asked: "Did L. E. Sloan, his agent, have authority and instruct you to credit this two dollars as a part payment on this note?" to

which question an objection was interposed as incompetent, irrelevant, and immaterial. This was sustained, and the court's ruling is assigned as error. There is a possible assumption in the question that L. E. Sloan was the agent of the defendant, but otherwise it was not subject to the objection for incompetency or irrelevancy. It was an inquiry as to his authority to direct the credit, and as to whether he instructed it to be made. It was significantly leading, however, and coming, as it did, without any previous attempt to show the alleged agency in the usual way, we cannot say that there was error in sustaining the objection.

2. It was further developed that witness had written to defendant from Indiana regarding the corn crop, that he (witness) had purchased it, and that defendant's share or interest therein amounted to two dollars, and that he had received an answer from him but that it did not specify anything in regard to the two dollars, whereupon the inquiry proceeded as follows:

"Q. You have no letter, then, regarding the payment of the two dollars?

A. No; I have not.

Q. Did you have a talk with defendant regarding that two dollars?

A. No, sir. He was in Oregon, and I was in Indiana.

Q. At the time you gave credit on this note did you write any letter to the defendant telling him what you had done, and asking him if it was agreeable to him?

A. Yes, sir; I did.

Q. When was this when you so addressed a letter to him?

A. About the 15th of October.

Q. What year?

A. 1901.

Q. Did you know what his post-office address was at the time you addressed the letter?

A. I did.

Q. What was his post-office address?

A. North Powder, Oregon.

Q. You may explain to the jury how you addressed the letter. In what way did you write, if you wrote to him—on a piece of paper inclosed in an envelope?

A. I wrote him a business letter.

Q. The letter that you say that you wrote him about the 15th of October? You may tell the jury in what way you wrote him; that is, in what way you got the letter to him.

A. I wrote a letter, and placed it in an ordinary sized envelope, addressed it to B. L. Sloan, North Powder, Oregon, with my return on the upper left-hand corner, P. V. Sloan, Marengo, Indiana, and placed a United States postage stamp in the upper right-hand corner, and placed it in the post-office at Marengo.

Q. Was that letter ever returned to you?

A. No, sir."

An agent's authority from a principal cannot be proven by his own statements that he is such agent, and, to let in proof of his acts or concessions with a view to binding the principal, it is essential that the agency should be first shown: *Connell v. McLaughlin*, 28 Or. 230 (42 Pac. 218); *Wright v. Evans*, 53 Ala. 103; *Scott v. Crane*, 1 Conn. 255.

3. But this does not answer the contention of counsel here, which is that the evidence introduced was sufficient to go to the jury, from which they might reasonably infer that defendant acquiesced in or ratified the indorsement made by plaintiff upon the note. Unquestionably the defendant could expressly have assented to the plaintiff's act in making the appropriation of his property or money in part payment of the note and the indorsement of the same thereon, which would have been an approval and tantamount to a ratification of the plaintiff's acts, though unauthorized in the first instance. It is also true that defendant might have given assent to the unauthorized acts of the plaintiff by implication, as if the plaintiff had informed the defendant in person unequivocally of what he had done with his property, and defendant had said nothing, but allowed the transaction to remain for a considerable length of time without objection or protest, especially if his silence had influenced plaintiff to change his position to his disadvantage. So it is in a case like the present, if it is true that the plaintiff wrote the defendant soon after his receipt of defendant's property and its indorsement upon the note, and told him candidly and fully of what he had done, and the defendant remained silent, thereby lulling plaintiff into repose for a greater length of time than would otherwise have been given, then his silence ought to be taken as an acquiescence

in what had been done, and a ratification of the unauthorized acts of the plaintiff in the first instance. Persons do not usually remain silent when they are put into possession of the knowledge that their property is being appropriated without warrant or right and converted to the use of another, and silence thereafter for a considerable length of time with full knowledge of the facts would indicate, in some measure at least, an assent to what had taken place, and therefore a ratification of the unauthorized act. We are impressed that the testimony above noticed should have gone to the jury for their consideration as to whether there was an acquiescence in or ratification of the acts of the plaintiff in appropriating defendant's property and making the indorsement of the same upon the note. There is a presumption, disputable in character, that a letter duly directed and mailed was received in the regular course of the mail (B. & C. Comp. § 788, subd. 24), and it was competent for the jury to have considered this in connection with the other testimony bearing upon the case.

The judgment of the circuit court will therefore be reversed, and the cause remanded for such other proceedings as may seem proper.

REVERSED.

Argued 19 January, decided 20 February, 1905.

STATE v. LEE.

79 Pac. 577.

PROOF OF OTHER CRIMES NOT INCIDENTAL TO THE ONE CHARGED.

1. Although proof of the commission of other crimes is sometimes admissible as incidental to the crime charged, it is never allowable to show that defendant has committed, or is said to have committed, crimes not connected with the one for which he is on trial.

For example, in a prosecution for larceny of a calf, after a witness had admitted that he did not feel kindly toward defendant, he should not have been permitted to state that his feelings were influenced by the supposition that defendant had stolen cattle in the neighborhood where he lived, for such a statement was merely an expression of the opinion that defendant was a thief, and was not connected with the disappearance of the calf, nor did it explain the bias of the witness.

SHOWING CHARACTER OF DEFENDANT.

2. Evidence of defendant's character or his general reputation is not admissible until he has raised the issue.

WITNESS—EXPLAINING BIAS.

3. Where it appears that a witness is biased he may state in general terms the reasons for his feeling, but details should be avoided.

From Washington: THOMAS A. MCBRIDE, Judge.

James G. Lee, feeling that he had not received justice by a sentence of four years in the penitentiary, appeals from a conviction of larceny.

REVERSED.

For appellant there was an oral argument by *Mr. Harry Taylor Bagley*, with a brief over the names of *Henry E. McGinn* and *H. T. Bagley* to this effect.

In a prosecution for larceny it is prejudicial error to admit evidence that defendant was suspected of committing other larcenies. Even if it could be shown that such other larcenies had been committed by the defendant, it not appearing that such other larcenies were a part of the transaction for which the defendant was on trial, or connected with it in respect to either time or locality, they could not be received in evidence against him. Nothing can be gained by presenting the suspicions of hostile neighbors: *State v. Olds*, 18 Or. 440 (22 Pac. 940); *State v. Baker*, 23 Or. 441 (32 Pac. 161); *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892); *People v. Romano*, 84 App. Div. 318; *People v. Molineaux*, 168 N. Y. 264, 291 (61 N. E. 286); *People v. Guajardo*, 24 Tex. App. 603; *Denton v. State*, 42 Tex. Cr. Rep. 427, 429; *State v. Fritchette*, 88 Minn. 145 (92 N. W. 527); *People v. Carpenter*, 136 Cal. 391, 393 (68 Pac. 1027); *Gay v. State*, 115 Ga. 204 (41 S. E. 685); *State v. Murphy*, 84 N. C. 742; *State v. Sheppard*, 49 W. Va. 597 (39 S. E. 676); *People v. Ascher*, 126 Mich. 637, 643 (86 N. W. 140); *Paulson v. State*, 118 Wis. 89 (94 N. W. 771); *Commonwealth v. Jackson*, 132 Mass. 16; *State v. Kirby*, 62 Kan. 436, 443 (63 Pac. 752); *State v. Gottfreedson*, 24 Wash. 398 (64 Pac. 523).

For the State there was an oral argument by *Mr. Harrison Allen*, District Attorney, and *Mr. Edmund Burke Tongue*, with a brief to this effect.

The purpose of the question asked of the witness Dennis was to show a hostility on his part toward the defendant, and then the witness had a right to explain the exact state of his feeling toward defendant and the reason therefor: *Wharton*, Crim. Ev. § 477; *Fisher v. State*, 58 Ala. 215; *Beasley v. People*, 89 Ill. 571; *Ellsworth v. Potter*, 41 Vt. 687; *State v. Warren*, 41 Or. 348, 356 (69 Pac. 679).

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant was tried and convicted of the larceny of a calf, the property of one Dennis. From the judgment sentencing him to the penitentiary he appeals.

1. Dennis was a witness for the State, and gave material testimony tending to support the theory of the prosecution. On cross-examination he was asked, "Your feelings have not been good toward him (the defendant)?" and replied, "No." He was then asked, "You and Mr. Boyd are known to be the enemies of Mr. Lee?" and answered, "I don't know how it is known. Q. What is the fact about it? A. I don't bear him any ill will, only it is the general supposition up there"— Here objection was made to the witness further answering the question, but it was overruled, and he continued: "That Mr. Lee has been getting away with cattle. There has been a good many cattle missing up there for years, and for that reason I have no particular friendship for him, or any one else that is in that kind of business." A motion was made to strike out all the testimony of the witness after the words "ill will," but it was overruled, the court saying, "I think he has a right to explain why." These rulings were erroneous, because the evidence objected to tended to show the commission by the defendant of crimes other than the one charged against him, or to prove his general bad character. Proof of the commission of a crime unconnected with that alleged in the indictment or information cannot be given against a defendant: *State v. Baker*, 23 Or. 441 (32 Pac. 161); *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892); *State v. McDaniel*, 39 Or. 161, 173 (65 Pac. 520).

2. Nor is evidence of defendant's general reputation or bad character admissible until he has himself put his character in issue: Wharton, Crim. Ev. § 64.

3. It is argued by the State that the testimony objected to was the legitimate result of the cross-examination, and merely tended to explain the grounds of the feelings or bias of the witness toward the defendant. The hostility of a witness to the party against whom he is testifying affects his credibility, and the extent thereof is a proper subject of cross-examination. When

such examination discloses that the witness is biased or hostile to the party against whom he is testifying, he has a right to state, without entering into particulars, the grounds of such bias or ill will: *State v. Warren*, 41 Or. 349 (69 Pac. 679); *Ellsworth v. Potter*, 41 Vt. 687; *Fincher v. State*, 58 Ala. 215. But here the witness denied that he had any ill will or bias toward the defendant, except such as might arise from the general supposition that he had been committing other crimes. The evidence did not go to an explanation of the personal feelings of the witness. Its manifest tendency was to show the general reputation of the defendant, and not to explain the ill will or bias of the witness.

Judgment reversed, and new trial ordered.

REVERSED.

Decided 9 January, 1905.

BARNES v. LEIDIGH.

79 Pac. 51.

CONTRACTS—PERFORMANCE BY INSTALLMENTS*—ACCRUAL OF ACTION.

1. In the case of a contract of sale to be performed by installments, the vendor may sue for any proportionate payment whenever it is due without showing a full performance of the contract.

As an example: Where a sawmill owner contracted to sell and deliver the entire output of his mill for a certain period, the delivery, acceptance and payments to be made monthly, the vendor may sue for any installment whenever it is overdue, without reference to the balance of the contract. He need not plead or prove compliance with that part of the contract subsequently to be performed.

EVIDENCE OF MEANING OF PARTICULAR TERMS.

2. In an action on a contract to purchase a quantity of lumber at a specified price for "merchantable lumber, mill run," it is competent to show by oral testimony the meaning of those words in the lumber business in that vicinity, they being unusual words without settled judicial meaning.

REFUSING INSTRUCTIONS ALREADY GIVEN.

3. Instructions proposed by counsel may properly be refused when they have already been practically given in the language of the judge.

From Union: ROBERT EAKIN, Judge.

Statement by MR. JUSTICE BEAN.

This is an action by J. H. and D. Barnes against John H. Leidigh and another to recover \$349.07 for lumber sold and

*NOTE.—As to the right of one party to abandon or rescind a contract because of the default of the other party, see *Lake Shore & M. S. Ry. Co. v. Richards*, 30 L. R. A. 33, with note, and *Ross Mesban F. Co. v. Royer Wheel Co.*, 68 L. R. A. 829.

delivered. In February, 1903, the plaintiffs and defendants made a contract in writing as follows:

"That the said J. H. Barnes & Son have this day sold to the Lake Superior Lumber Company their entire mill cut for the year 1903—mill located near Elgin, Oregon; the lumber to be delivered and unloaded from wagons at proper piles in the yards of the Lake Superior Lumber Company at Elgin, Oregon, for which the Lake Superior Lumber Company agrees to pay \$9.25 per M for merchantable lumber—mill run. The said J. H. Barnes & Son have sold to the Lake Superior Lumber Company their entire cut of lath and moulding strips at the following prices: Lath, \$2.50 per M; 1 inch and 1½ inch moulding strips at 25c per 100 lineal feet; 2 and 2½ inch at 35c; and 3 and 3½ inch at 45c; payments to be made as follows: All lumber delivered during the month to be paid for the 10th of the following month.

"The said J. H. Barnes & Son agrees to sort and furnish from the common at the mill and give the Lake Superior Lumber Company the use of their lumber yard for a rental of \$50 per year.

"The said J. H. Barnes & Son agrees to cut lumber of such dimensions as ordered by the Lake Superior Lumber Company."

The complaint alleges that defendants paid for all lumber and material delivered under the contract from the 11th of February to the 31st of July, but that there is a balance of \$349.07 due and unpaid for lumber delivered during the month of August. The answer admits the contract as alleged, but avers that, at the time of its execution, defendants were engaged in buying and shipping lumber principally upon orders; that plaintiffs were so informed, and knew that they were to cut and deliver no lumber except such as would be suitable for the purpose stated, and of sizes and dimensions to be ordered by the defendants; that defendants furnished plaintiffs cutting orders, in pursuance of which they delivered lumber to the amount and value of \$8,208.25, for which they have been paid in full, but that, in violation of their contract, they delivered 37,845 feet of defective and unmerchantable lumber, for which they charged defendants the contract price, amounting to \$349.07; and that plaintiffs did not furnish to defendants the entire output of their mill, but sold and delivered 5,000 feet of merchantable lumber to other parties, to defendants' damage in the sum of \$15. The reply denies the

allegations of the answer, and affirmatively pleads that defendants are estopped to claim that any lumber delivered prior to August, 1903, was not of the quality called for by the contract, because it received, accepted, and paid for the same with full knowledge of the facts. Plaintiffs had a verdict and judgment, and defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Charles H. Finn*.

For respondents there was a brief over the name of *Crawford & Crawford*, with an oral argument by *Mr. Thomas H. Crawford*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. The first three assignments of error challenge the sufficiency of the complaint on the ground that the contract sued on is entire, and not severable, and therefore no recovery can be had without allegation and proof of full performance. The contract provides for the sale by the plaintiffs to the defendants of the entire mill cut of the former for the year 1903, but it is stipulated that all lumber delivered during one month shall be paid for on the 10th of the following month. Delivery, acceptance, and payment were therefore to take place by installments extending through the season, and in such case a vendor may maintain an action to recover for any installment when it becomes due, without pleading or proving full performance on his part: *Clark, Contracts*, § 275, p. 657; *Tenny v. Mulvaney*, 8 Or. 129; *Coos Bay R. Co. v. Nosler*, 30 Or. 547 (48 Pac. 361); *Coos Bay R. Co. v. Dixon*, 30 Or. 584 (48 Pac. 360); *Oliver v. Oregon Sugar Co.* 42 Or. 276 (70 Pac. 902).

2. The fourth, fifth, eighth, and ninth alleged errors relate to the admission of testimony to show the meaning of the words "merchantable lumber, mill run," used in the contract, and the character of lumber properly included therein. The argument seems to be that by the contract the plaintiffs were to furnish the defendants, "as jobbers and shippers to a foreign market," their mill cut for the season of 1903, to be "manufactured upon cutting orders of the defendants and for the express purposes of their trade"; and therefore it was error to admit evidence

to show what would be "merchantable lumber, mill run," according to the local meaning of these words as understood in the business. The contract does not provide that the lumber is to be furnished defendants "as jobbers and shippers to a foreign market," nor that it shall be suitable for their trade, but simply that it shall be "merchantable lumber, mill run." It is true, there is an allegation in the answer that plaintiffs knew at the time the contract was made that the lumber was intended for a special purpose, and made the contract with reference thereto. This averment is denied by the plaintiffs. It was competent, therefore, from their standpoint, to show the meaning of the terms "merchantable lumber, mill run," as used in the vicinity where the contract was made. These words are not in common use, and have no settled judicial meaning. They are peculiar to the lumber trade or business, and, as the evidence tended to show, have a special meaning, and are well understood by persons engaged in such business. The testimony was therefore important and necessary, in order to enable the court to construe the contract, and the jury to render a proper verdict: 2 Wharton, Evidence (2 ed.), § 962; *Corneil v. New Era Lum. Co.* 71 Mich. 350 (39 N. W. 7); *Jones v. Anderson*, 82 Ala. 302 (2 South. 911).*

3. The sixth and seventh points refer to the refusal of the court to give certain instructions requested. The first is that, if the plaintiffs knew at the time the contract was made that the lumber to be furnished by them was intended for a certain purpose, it must have been suitable for such purpose, to be merchantable under the contract, and that, before the monthly settlement between the parties would be binding on the defendants as an acceptance of the lumber previously delivered, it must appear that such settlements were made with full knowledge of the facts. Both of these instructions were given by the court in practically the same language as requested, and we are unable to understand why their refusal should be assigned as error.

The remaining assignments of error were to the giving of certain instructions by the trial court. No objections to any of

*NOTE.—See annotations to 52 Am. St. Rep. 521, 65 Am. St. Rep. 572, and 6 L. R. A. 42. REPORTER.

these instructions are suggested in the brief, and, from a reading of them, we are not able to discover any. Judgment affirmed.

AFFIRMED.

Decided 16 January, 1905.

BURTON v. ANTHONY.

79 Pac. 185, 68 L. R. A. 826.

LIEN FOR LOAN TO MINOR TO PROTECT HIS LAND.*

1. No lien will be imposed by equity upon the property of a minor in favor of one who has advanced money at the request of such minor to redeem the property from a mortgage sale, even though the minor agreed that the lender should be subrogated to the rights of the mortgage creditor.

REINSTATEMENT OF MORTGAGE LIEN CANCELED BY MISTAKE.

2. Equity will enforce an agreement between a mortgagee who has foreclosed his mortgage and bought in the property with one who is to provide means to pay the debt, that the judgment, and the lien shall be assigned to the lender as his security for the money, where by mistake the land was redeemed from the sale and the lien canceled.

From Yamhill: REUBEN P. BOISE, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by L. C. Burton against Clara L. E. Anthony, Walter B. E. Anthony, her minor son, and H. H. Burton as his guardian, to establish and enforce an alleged lien. It is averred in the complaint that the defendant Walter B. E. Anthony is under the age of fourteen years, and that the defendant H. H. Burton is the duly appointed guardian of his estate; that on January 27, 1900, his mother, the defendant Clara L. E. Anthony, being the owner of an undivided one sixth of certain real property in Yamhill County, in consideration of love and affection and one dollar, executed to her son a quitclaim deed of all her interest in the premises, subject to a mortgage thereon executed by her and her late husband, E. H. Anthony, deceased; that this mortgage was foreclosed, the land sold to the mortgagee, and the sale confirmed; that the premises were redeemed by Mrs. Anthony and her son, who were obliged to pay therefor the sum of \$1,010.75, receiving from the sheriff of that county a certificate evidencing such fact; that, the redemptioners having no means with which to pay the sum required, plaintiff, at their

*NOTE.—See monograph, Contracts of Infants, 18 Am. St. Rep. 573-724, and note on Liability of Infants for Necessaries in 12 L. R. A. 859.

request, loaned to Walter the money necessary for that purpose, "in the expectation that he would be substituted in the place and stead of the creditor"; that Walter has no means with which to pay the sum so loaned, except his interest in such real property, and, unless plaintiff is decreed a lien thereon, or subrogated to the rights and remedies of such creditor therein, he will lose the money so advanced. The defendant Walter, appearing by his guardian, filed an answer denying the material allegations of the complaint; and, a trial being had, and the evidence taken, the court, concluding that the complaint did not state facts sufficient to entitle plaintiff to the relief prayed for, dismissed the suit, and he appeals. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600. AFFIRMED.

For appellant there was a brief over the names of *Rufus I. Eaton* and *George Noland* to this effect.

I. While an infant may not ordinarily make contracts, yet equity will frequently create or imply a contract on his part in order to prevent a wrong: 13 Am. & Eng. Enc. Law (1 ed.), 610; 16 Am. & Eng. Enc. Law (2 ed.), 236; 1 Story, Eq. Jur. (12 ed.), § 240.

II. Contracts in discharge of legal obligations are binding upon an infant; for if he is under legal obligation to do an act, he may by a fair and reasonable contract bind himself to perform it: 16 Am. & Eng. Enc. Law (2 ed.), 274; *People v. Moores*, 4 Denio, 518 (47 Am. Dec. 272); *Bavington v. Clarke*, 2 Pen. & W. 115 (21 Am. Dec. 436); *McCall v. Parker*, 13 Met. 372 (46 Am. Dec. 735).

III. The defendant, Walter Anthony, took this property, subject to mortgage, which he was legally bound to pay, in order to save the property; and a decree of a lien thereon, although the party himself could not legally make such a contract, should be rendered when the circumstances are such that justice can only thus be accomplished: 13 Am. & Eng. Enc. Law (1 ed.), 614; 24 Am. & Eng. Enc. Law (1 ed.), 266, 296; *Clark v. Clark*, 58 Miss. 68.

IV. If advances made by a stranger were made with the expectation of being subrogated to the rights of the creditor he is

entitled to that advantage: *Coe v. New Jersey Mid. R. Co.* 31 N. J. Eq. 105; *Tradesmen's B. & L. Assoc. v. Thompson*, 32 N. J. Eq. 133.

V. The person who paid the money with the understanding that the certificate of sale would be assigned to him as security is entitled to be treated as though that had actually been done. The cancellation of the judgment through a redemption with plaintiff's money ought not in equity to prevent his being considered as the assignee of the certificate: 24 Am. & Eng. Enc. Law (1 ed.), 250; *Pratt v. Law*, 13 U. S. (9 Cranch) 456 (3 L. Ed. 791); *Crippen v. Chappel*, 35 Kan. 495 (57 Am. Rep. 187, 11 Pac. 453); *Neeley v. Jones*, 16 W. Va. 625 (37 Am. Rep. 794); *MacGrath v. Taylor*, 167 U. S. 688 (17 Sup. Ct. 961, 42 L. Ed. 326); *City Sav. Bank v. Whittle*, 63 N. H. 587 (3 Atl. 645); *Gans v. Thieme*, 93 N. Y. 225.

No appearance for respondent.

MR. JUSTICE MOORE delivered the opinion of the court.

Though the sufficiency of the complaint is the only question presented by this appeal, it is deemed proper to state the substance of the testimony, showing the nature of the claim sought to be established. It appears from the transcript that the defendant Clara L. E. Anthony is plaintiff's sister, who, having no property and being a widow, is compelled to labor to support herself and her son; that, the land of the defendant Walter B. E. Anthony having been sold under the decree of foreclosure, he and his mother requested plaintiff to advance the money necessary to redeem the premises, assuring him that he should be subrogated to the rights of the judgment creditor; and that, to secure such sum, plaintiff was obliged to mortgage his undivided one sixth interest in the same real property. As an affirmation of the decree herein may deprive plaintiff of his claim against his nephew, and also of his own interest in the real property, the merits of his demand are apparent, and it remains to be seen whether or not the complaint states facts sufficient to authorize a court of equity to impose a lien on a minor's interest in land to secure the payment of money advanced at his request to

redeem the premises from a sale thereof under a decree of foreclosure.

1. It is argued by plaintiff's counsel that the redemption of the land was necessary to preserve it, thereby rendering the agreement of the minor to repay plaintiff the sum of money borrowed for that purpose a binding obligation, which the court should have enforced, but, not having done so, an error was committed in dismissing the suit. The rule is elementary that, if an infant is under a legal obligation to do an act, he may, by a fair and reasonable contract, bind himself to perform it: 16 Am. & Eng. Enc. Law (2 ed.), 273. As an infant is bound to pay a debt contracted for necessities, his promise to repay a sum of money advanced by another for that purpose constitutes a binding obligation: *Randall v. Sweet*, 1 Denio, 460. Thus, where the statute compels a putative father to indemnify a municipality against expense incurred in supporting his illegitimate child, and makes it necessary for him to enter into a bond with sureties for the performance of the obligation which is thus imposed, as the only means by which he can be discharged from arrest, the law thereby confers on him plenary power to make a binding obligation; and, having done so, his infancy will not constitute a defense to him or his sureties in an action based on a failure to comply with the terms of the undertaking: *McCall v. Parker*, 13 Met. (Mass.) 372 (46 Am. Dec. 735); *People v. Moores*, 4 Denio, 518 (47 Am. Dec. 272). So, too, an infant father of an illegitimate child, on a prosecution of bastardy, having given a promissory note with his father as surety, to the mother of such child, as a compromise settlement, it was held that his infancy did not constitute a defense in an action on the note: *Gavin v. Burton*, 8 Ind. 69. In deciding that case, Mr. Justice PERKINS says: "So, as the law authorizes an infant father of a bastard child to settle with the mother, and secure to her compensation for keeping such child, it impliedly gives him power to execute instruments necessary in making such settlement." To the same effect is the case of *Stowers v. Hollis*, 83 Ky. 544. In *People v. Mullin*, 25 Wend. 698, the defendant, an infant, having been convicted of the crime of assault and battery, and imprisoned

under the sentence which followed, offered to assign his property in compliance with the provisions of a statute of New York which permitted the discharge of prisoners who were found guilty of such misdemeanors; and it was held that, as an adult was entitled to the benefit of the act, which by its terms applied to "every person," an assignment by a minor must be regarded as valid, notwithstanding his nonage.

In the cases to which attention has been called, indemnity from punishment by imprisonment of persons convicted of misdemeanors has been afforded by complying with the provisions of the statutes authorizing it. The discharge of a person when imprisoned, or his exemption from punishment when found guilty of petty offenses, by complying with the terms of a statute, must be regarded by the legislative department as of more importance to the State, which is thereby freed from the expense of his maintenance during the term of incarceration, than the retention of his property. These acts, being general in their terms, are held to be applicable to all persons; and, as a corollary therefrom, the conclusion is deduced that ample power is thereby conferred on an infant to bind himself to pay an obligation which the law imposes as a condition precedent to securing his freedom from imprisonment, or exemption from punishment for the commission of minor crimes. This legal principle, which is clearly established in the cases mentioned, can have no application to the defendant Walter B. E. Anthony. He could not have been arrested for a failure to pay the mortgage debt on his interest in the land, the redemption of which terminated the sale, discharged the lien of the mortgage which was merged in the decree, and restored to him his estate: B. & C. Comp. § 250. Though the redemption of the land conferred on him a pecuniary benefit, the furnishing of the money for that purpose at his request does not, by reason of his incapacity to enter into a valid contract, create a binding obligation, because it was not necessary to his sustenance. Thus, in *McCarty v. Carter*, 49 Ill. 53 (95 Am. Dec. 572), it was held that a contract made with a minor to furnish labor and materials for the improvement of his property was not binding on him, and the contractor could claim

no lien therefor against the property benefited thereby. In deciding that case Mr. Justice LAWRENCE says: "An infant is not bound by his contract, except in certain cases, to which the erection of a building for rent does not belong. A conveyance or mortgage by him of his real estate would not be binding upon him, and the legislature certainly never intended to allow him to incumber his property indirectly by a contract for its improvement, when he cannot do the same thing in a binding mode by an instrument executed expressly for the purpose. A minor who has nearly attained his majority may be as able in fact to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held sui juris. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years, and neither in one case nor in the other can it permit a contractor to claim a lien against his property under the guise of a contract for improvement. This would expose minors to ruin at the hands of designing men. The mechanic who erects a building must take, like all other persons, the responsibility of ascertaining that he is contracting with a person who has reached the requisite age." To the same effect, see *Mathes v. Dobschuetz*, 72 Ill. 438, and *Price v. Jennings*, 62 Ind. 111. The improvement of a minor's property by erecting buildings thereon in pursuance of his contract cannot be regarded as of less importance—the value being equal—than the saving of his estate by the redemption thereof at his request; and, as no lien can be created in the first instance, none can be imposed in the latter.

Plaintiff's counsel, in support of the principle for which they contend, rely upon the rule announced in *MacGreal v. Taylor*, 167 U. S. 688 (17 Sup. Ct. 961, 42 L. ed. 326). In that case an infant female, without being interrogated as to her age, or making any representations in relation thereto, borrowed a sum of money to pay off an incumbrance on her land and to improve the property; giving a trust deed thereon as security therefor. After attaining her majority she refused to pay the money bor-

rowed, notifying the adverse party that she rescinded the contract and disaffirmed her deed; and it was held that, the money secured by her having been used in improving her property and in discharging liens thereon, the premises should be subjected to the benefits received. In that case Mr. Chief Justice FULLER and Mr. Justice BROWN dissented. If that decision had been rendered by the entire court, the rule adopted would not be controlling in the case at bar until the defendant Walter B. E. Anthony became twenty-one years old. The complaint, therefore, does not state facts sufficient to constitute a cause of suit. The mortgage having been foreclosed, under which decree the premises were sold to the mortgagee and the sale confirmed, he may have preferred to retain his interest in the land, rather than to have accepted the amount of his bid therefor. He could not have been compelled to assign the judgment, nor could the assurance of Mrs. Anthony or of her son that plaintiff should be subrogated to the rights and remedies of the judgment creditor be of any force or effect, because it was impossible for them to fulfill their representations.

2. If an agreement was entered into between such creditor and plaintiff to the effect that the judgment was to be assigned to the latter in consideration of the payment of the sum due, but, instead thereof, the premises, by mistake, were redeemed from the sale, a court of equity will, upon an averment and proof of such fact, restore the lien of the judgment. It may have been intended by the statement in the complaint that plaintiff advanced the money to his nephew "in the expectation that he would be substituted in the place and stead of the creditor," to allege that an agreement to that effect had been entered into between plaintiff and the mortgagee or his representative, and, if so, it may be desired to institute another suit, in which such fact can be averred in the complaint. With this possible object in view, the decree of the court below, dismissing the complaint, will be affirmed, but such dismissal shall be without prejudice, and it is so ordered.

AFFIRMED.

Decided 3 January, 1905, rehearing denied.

WILDER v. REED.

78 Pac. 1027.

FEES FOR COUNSEL OF RECEIVERS.

1. Receivers ordinarily are allowed to employ counsel to advise them on matters of law, in order to avoid interrupting the court, and the fees of such counsel constitute a part of the expense of the receivership.

APPEALABILITY OF ORDER ALLOWING FEES TO COUNSEL FOR RECEIVER.

2. An ex parte order allowing fees to the attorneys for a receiver is merely interlocutory, and no appeal can be taken therefrom. The order passing on the final report of the receiver is the appealable order, and must be made after notice to creditors: *Rockwell v. Portland Sav. Bank*, 35 Or. 303, distinguished.

From Multnomah: ARTHUR L. FRAZER, Judge.

Suit by Gardner K. Wilder against W. I. Reed. From an order making an allowance to the receiver's counsel, defendant appealed. The respondent moved to dismiss the appeal.

DISMISSED.

Mr. William Marion Calk for the motion.

Mr. Ralph Rolofson Duniway, contra.

PER CURIAM. This is a motion to dismiss an appeal. A suit was begun to dissolve a partnership and for an accounting, and a decree was rendered therein as prayed for, whereupon a receiver was appointed, who employed counsel to aid him in the discharge of his trust. Prior to the final settlement the attorneys so engaged petitioned the court for an allowance of \$250 as compensation for their services, in support of which an affidavit was filed by the receiver, but the transcript does not show that the creditors of the partnership ever had notice of the application. The defendant filed an objection to the petition, supported by affidavits, to which counter affidavits were interposed, and on this issue the court allowed the sum demanded, ordering the receiver to pay it, and the defendant appeals.

In support of the motion under consideration, it is maintained that the order complained of is not final, and cannot be reviewed, except on appeal from the decree settling the receiver's final accounts. A receiver may apply directly to the court appointing him for instructions to his duty in the care and management of property intrusted to him, but, in order to avoid frequent requests to that source, he may employ counsel to advise

him, and their reasonable fees for the service performed constitute a proper charge to be paid ultimately out of the funds in his hands. When a partnership has been dissolved by a decree, and a receiver appointed, the fees of counsel employed by him do not constitute a claim against the partnership, the life of which has terminated, but an allowance therefor may be made to the receiver as a compensation due him, and not to his counsel: *First Nat. Bank v. Oregon Paper Co.* 42 Or. 398 (71 Pac. 144, 971). An action cannot be maintained by an attorney against a receiver in his representative capacity for services performed in advising him as to his duties, so as to be a claim directly against the property in the hands of the receiver: *Joost v. Bennett*, 123 Cal. 424 (56 Pac. 43). In that case it was held that all charges for services rendered to a receiver, of whatever kind, were to be allowed by the court to the receiver as a part of his expenses, and not to the claimant, the court saying: "The charges of the plaintiff for services are in this respect exactly like the expenses of administration incurred as an administrator."

2. As the fees allowed by a court for attorneys employed by a receiver are analogous to charges for like services performed for an executor or an administrator, the rule of law applicable to the settlement of a decedent's estate must govern in determining the kind of order sought to be reviewed herein. Ex parte orders of a county court directing an administratrix to pay charges against the estate of an intestate afford her no protection when brought in question and found to be unauthorized: *Osburn's Estate*, 36 Or. 8 (58 Pac. 521, 5 Prob. Rep. Ann. 148). So, too, the fees of an attorney for services performed in the settlement of such an estate constitute a charge against the representative thereof personally, and when, on an ex parte application therefor, any sum is allowed by the county court, its order is interlocutory, and may be set aside or modified by the tribunal making it, or, on its refusal to do so, the circuit or supreme court may on appeal annul or alter the allowance made: *Mills's Estate*, 40 Or. 424 (67 Pac. 107). In the case at bar, no notice of the application for an allowance of counsel fees was given to the partnership

creditors, who were entitled to their day in court, and by reason of this failure the order complained of is only interlocutory.

This conclusion does not contravene the rule announced in *Rockwell v. Portland Sav. Bank*, 35 Or. 303 (57 Pac. 903), in which it was held that the refusal of a court to list a claim against a fund in the hands of a receiver, when presented by the claimant, was a final judgment, from which an appeal would lie. In that case the claim sought to be established was not against the receiver personally, but against the defendant corporation, and arose prior to the institution of the suit for its dissolution. The presentation of the claim for allowance was equivalent to the bringing of an independent suit by the claimant against the receiver as the representative of the debtor. In *Baker v. Williams Banking Co.* 42 Or. 213 (70 Pac. 711), a receiver reported to the court a list of claims filed with him against an insolvent corporation, upon the hearing of which the demands were allowed and also interest on the obligations that stipulated therefor, but no provision was made for the payment of interest on any other claim. A controversy thereafter arose as to the effect of the court's order, some of the parties contending that the allowance of a claim carried with it interest thereon at the lawful rate from the date of its approval. In deciding that case it was held that as the claim was presented by the receiver, and not by the claimant, the rule invoked was not applicable, nor the order final, as to the rate of interest on the claims that did not stipulate for the payment thereof. The report of a receiver, when filed, is not tantamount to the bringing of an independent suit by a claimant to establish a claim; nor is an order allowing claims listed in a receiver's report a final judgment, so far as it relates to interest, the payment of which is not stipulated for in the obligations evidencing the indebtednesses.

In the case at bar the application for the allowance of counsel fees was not a claim against the partnership, incurred prior to its dissolution, but was a charge against the receiver personally; and, the creditors not having had any notice of the application, the order of the court in allowing it is not final. These considerations lead to a dismissal of the appeal, and it is so ordered.

DISMISSED.

Decided 3 January, 1905.

BOARD OF REGENTS *v.* HUTCHINSON.

78 Pac. 1028.

CONCLUSIVENESS OF PART OF DECREE NOT APPEALED FROM.*

1. Judgments and decrees, or parts of them, not appealed from are conclusive on all parties, and matters therein decided will not be reviewed on appeal.

EASEMENT BY PRESCRIPTION—WATERS.

2. The continuous use of a ditch for thirty-five years by the one who dug it and his successors in interest creates an easement that will be protected by the courts. The word "ditch" may also include a natural slough that has been used as part of the waterway.

NEGLIGENT USE OF EASEMENT—IRRIGATING DITCH.

3. The owners of an easement must so use it as not to unnecessarily injure the servient estate. For example, one having an easement across farming land for an irrigating ditch, will not be permitted to allow the ditch to become stopped with debris and thus cause the water to injure the adjoining land, or otherwise use it so that it becomes a nuisance to the land affected.

VALIDITY OF COMPROMISE SETTLEMENT—ILLUSTRATION.

4. A controversy having arisen between plaintiffs and defendants as to the right of the latter to conduct water across plaintiffs' land, and as to whether defendants were using their ditch in a proper manner, a settlement of such dispute, by which defendants agreed to deepen the ditch west of a slough so as to prevent the water from unnecessarily accumulating in the slough, and that in the meantime plaintiffs should be entitled to maintain a drain box for the same purpose, was binding on both parties.

From Union: ROBERT EAKIN, Judge.

Suit by the Board of Regents of the State Agricultural College and another against James H. Hutchinson and another. From a decree in favor of defendants, but enjoining them from closing or interfering with a certain drain box, they appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Leroy Lomax*.

For respondents there was a brief over the name of *Crawford & Crawford*, with an oral argument by *Mr. Thos. H. Crawford*.

MR. JUSTICE BEAN delivered the opinion of the court.

This suit was commenced by the Board of Regents of the Agricultural College to establish an alleged right to the use of a part of the waters flowing in what is known in the record as the "Godley Ditch," to restrain the defendants from closing certain tap ditches taken therefrom, and to enjoin and restrain them

*NOTE.—See *Shook v. Coholan*, 12 Or. 239; *Shirley v. Burch*, 16 Or. 83; *Thornton v. Krimbel*, 28 Or. 27; *Cooper v. Thomason*, 30 Or. 162, and *Goldsmith v. Elwert*, 31 Or. 539.

from interfering with a drain box put in by the plaintiff to carry the surplus water from its land.

1. The decree of the court below was in favor of the defendants and against the plaintiff upon the first two points, and, as plaintiff has not appealed from that part of the decree, it is not before us for review: *Thornton v. Krimbel*, 28 Or. 271 (42 Pac. 995); *Goldsmith v. Elwert*, 31 Or. 539 (50 Pac. 867).

2. This leaves for our consideration only that portion of the decree appealed from by the defendants, and enjoining and restraining them from closing or interfering with the drain box referred to. The plaintiff owns a tract of land near Union, in Union County, described in the record as the "Warren Tract," and uses it as part of its experiment station grounds. The defendants own land lying west of that belonging to the plaintiff. Some thirty or thirty-five years ago one Godley, who then owned the land now belonging to the defendants, tapped Catherine Creek, a natural stream of water, at a point a short distance from the northeast corner of the Warren Tract, and by means of a ditch conducted water to the east line of the Warren Tract, and thence along such line to a point near the southeast corner, where a part of a natural slough was used, and from thence by a ditch along the south line of plaintiff's land to his place, where he and his successors in interest have ever since used the water for irrigation. The defendants have succeeded to all Godley's rights. Parallel to and near the Godley Ditch on the south is another ditch, known as the "McLane Ditch," and which crosses the slough or swale at the southeast corner of plaintiff's land by means of an embankment. Prior to 1902 the Godley Ditch had become somewhat filled up, and the bottom of that portion west of the slough at the southeast corner of the plaintiff's land was about twelve inches higher than the bottom of the slough, thus obstructing the flow of the water, and causing it to accumulate in the slough, and subirrigate and render unfit for cultivation a portion of the plaintiff's land. In the spring of 1902 the director in charge of the experiment station put in a drain box at the southeast corner of the Warren Tract and under the McLane Ditch to carry off the water, and prevent the drowning

out or destruction of some valuable experimental grasses. This box was below the level of the Godley Ditch leading west from the slough, and therefore prevented the water from flowing down the ditch to the defendants' land. The defendants closed the drain box two or three times, and threatened to have the director arrested for interfering with their water and ditch rights.

Thereupon a controversy arose between them and the plaintiff as to the respective rights of the parties, and in June, 1902, a conference was had between the president and secretary of the plaintiff, the director of the station, and the defendants for the purpose of settling such conflict and controversy, and it was then agreed, as we think the preponderance of the testimony shows, that as a settlement thereof the defendants should deepen the Godley Ditch west from the slough so as to prevent the water from unnecessarily accumulating in the slough and overflowing and subirrigating plaintiff's land; that in the meantime the drain box previously put in by the director should remain in place, and the defendants should be permitted to take water for the irrigation of their lands for the season of 1902 through and across the lands of the plaintiff, tapping the Godley Ditch north of the slough. There is some conflict, it is true, in the testimony upon this point, but Mr. Weatherford, the president of the board of regents, Mr. Daly, its secretary, and Mr. Leckenby, the director in charge of the station, all testify directly and unequivocally that the settlement and agreement were made as stated; and, while their testimony is contradicted by the defendants, the preponderance of the evidence is, we think, unquestionably with the plaintiff. The defendants did not comply with this agreement and deepen the ditch west of the slough, but, on the contrary, in the spring of 1903 cleaned out and enlarged the ditch leading from Catherine Creek to the slough on the east of the Warren Tract, and were threatening to turn an increased amount of water therein, when this suit was commenced. The defendants have an undoubted right to an easement over and across the lands of the plaintiff for their ditch and water right, with the right to use the slough at the southeast corner of the Warren Tract as part of their ditch.

3. This easement, however, must be used by them in such a manner as to impose as little damage to the servient estate as possible. They cannot negligently or carelessly permit the ditch to fill up and obstruct the flow of water so as to cause it to flow back and injure the plaintiff, nor can they enlarge their ditch or increase the flow of water therein to the plaintiff's damage, or in any manner so operate or use their ditch and water right as to render it a nuisance, or unnecessarily damage the servient estate: *Jacob v. Day*, 111 Cal. 571 (44 Pac. 243).

4. When, therefore, a controversy or dispute arose in good faith between the parties as to whether the defendants were using their ditch and water right in a proper and lawful manner, and that dispute was settled and compromised as stated, the agreement was, we think, binding on both parties, and ought to be enforced: *Smith v. Farra*, 21 Or. 395 (28 Pac. 241, 20 L. R. A. 115); *Sing On v. Brown*, 44 Or. 11 (74 Pac. 207). The plaintiff will therefore be permitted to maintain the drain box in its present position until such time as the defendants clean out and deepen the Godley Ditch west of the slough at the south-east corner of the plaintiff's land so as to carry off the water flowing in the ditch and prevent it from unnecessarily injuring or damaging the plaintiff, and when that is done the drain box must be removed by the plaintiff, and the ground restored to its former condition. Either party will have permission to apply to the court below for the enforcement of this decree.

AFFIRMED.

Argued 1 November, decided 12 December, 1904; rehearing denied.

BAUERS v. BULL.

78 Pac. 757.

PLEADING PURPOSE OF DIVERTING WATER—BURDEN OF PROOF.

1. An answer, in an action to restrain diversion of water, alleging continuous adverse user of the water for more than ten years, imposes on defendant the burden of proof in sustaining such allegation.

PRESUMPTION AS TO NATURE OF USE BY DECEASED CLAIMANT.

2. Where a deceased person probably attempted to assert an adverse claim of possession, the presumption is that it was initiated under a claim of right, and the burden then rests on the person against whom the adverse possession or use is asserted to show that the deceased and his successors were licensees.

EVIDENCE OF ADVERSE USE.

3. The evidence presented does not show that the claim of adverse use of the waters of Hot Springs Creek is well founded.

From Lake: HENRY L. BENSON, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

Suit for an injunction by Frank D. Bauers against John Bull to enjoin interference with the flow of water in a nonnavigable stream. The complaint states that plaintiff is the owner of a section of arid land in Lake County through which a creek flows southwesterly in a natural channel, carrying about one hundred inches of water, miners' measurement, and that about July 27, 1901, the defendant unlawfully entered his premises and constructed a dam in the stream, dug a ditch therefrom, and diverted all the water thereof, to plaintiff's irreparable injury. The answer denies the material allegations of the complaint, and for affirmative relief avers that defendant owns one hundred and sixty acres of land joining plaintiff's on the south, through which the creek also flows; that in 1886 his predecessor in interest dug the ditch in question, and during every season thereafter diverted the water from the stream, and used it in irrigating crops grown on the land now owned by defendant, which use has at all times been open, notorious, continuous, adverse, and under a claim of right, whereby a title by prescription has been secured to continue the use of the water flowing in the stream for the purposes stated; that July 27, 1901, the defendant entered upon plaintiff's premises to repair the ditch, which act constitutes the trespass alleged in the complaint; and that for more than ten years prior thereto he and his predecessor in interest have repaired the ditch, causing the water to flow therein. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree awarding to defendant the use of the water for irrigation, and authority to maintain the dam and ditch, and plaintiff appeals.

. REVERSED.

For appellant there was a brief over the names of *W. A. Wilshire* and *J. M. Batchelder*, with an oral argument by *Mr. Batchelder* and *Mr. Chas. A. Cogswell*.

For respondent there was a brief and an oral argument by *Mr. Asa Connor Hough*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

It is contended by plaintiff's counsel that the right to divert the water flowing through their client's premises is based on an alleged adverse user thereof for irrigation, and that the testimony fails to show that either the defendant or his predecessor in interest used water for that purpose, except possibly one season, or for any purpose, continuously during any period of ten years, and for these reasons the court erred in decreeing a right to use the water for irrigation, and in not granting plaintiff the relief which he demands. The testimony shows that Hot Springs Creek flows southwesterly, in a well-defined channel, into section 5, township 39 south of range 20 east of the Willamette Meridian, which is owned by plaintiff, where the stream forks, the eastern branch proceeding southerly to the northeast quarter of section 8, in that township and range, which is owned by defendant. The east fork of the stream originally terminated in the dry season on the north end of defendant's premises, where the water flowing therein spread over and percolated the western part of his land, causing it to produce good crops of wild hay; that in the fall of 1886 David Cleland, Sr., being the owner of the real property last above described, constructed a ditch, designated on a plat offered in evidence as "Ditch B," from Hot Springs Creek, commencing in section 5, in such township and range, at a point above the forks of that stream, whereby the water thereof was diverted and conducted to the northeast forty acres of his land; that in 1891 he died seized of these premises, and the defendant, having secured from his heirs the title thereto, opened this ditch in July, 1901, which had become filled with sediment, whereupon this suit was instituted.

David Cleland, Jr., as defendant's witness, testified that in the fall of 1887 he helped construct a ditch from the channel of the east fork of Hot Springs Creek easterly along the northern border of the northeast quarter of section 8, and first saw Ditch B, which he observed every year thereafter until 1899; that, his father having died in 1891, the witness entered into, and for seven years thereafter retained, possession of this land, all of which, except the northeast forty acres thereof, was naturally irri-

gated by the water from that branch, which, until he left the premises, constantly flowed therein, except about one month each year, when the entire volume, or nearly all of it, would be turned into Ditch B, causing it to flow to the northeast quarter of the northeast quarter of section 8, thereby rendering the irrigated part dry, and permitting the hay thereon to be cut; and that during the years mentioned no person ever questioned the right to repair Ditch B, or to use the water flowing therein; that the forty acres on which that ditch terminated was originally covered with wire grass and sagebrush, but about 1890 it was reduced to cultivation, and wild grass was thereafter raised thereon, which, in the opinion of the witness, could not be produced without irrigation. On cross-examination, in referring to the time the witness left the land of which his father died seized, he was asked—

“Q. Then you did some work there in irrigating this land—the northeast quarter of section 8 in this ditch—most of those years?

A. Yes.

Q. What particular years?

A. Well, as far as being positive, I done it every year. I would not swear positive I done it every year, but I always went down and helped my father in haying time, and we changed the water back and forth there. It seems to me every year I helped him in haying.

Q. If there was a ditch there, it didn't require very much changing to turn the water down onto the northeast quarter of 8, did it?

A. No. We put a dam in there, and turned the water there while we cut the hay on the other side.”

J. H. Bull, brother of and witness for the defendant, having testified that he helped make Ditch B, was asked:

“How many years after 1886 were you familiar with the ditch which you say you assisted Mr. Cleland in constructing?” and replied: “In 1891, I cut the hay on section 8 of Mr. Cleland's land, and used the water from the ditch to irrigate the hay. * *

Q. What proportion of the water of Hot Springs Creek was diverted into the ditch which you assisted in constructing in 1886? How much water would the ditch carry?

A. In haying time the ditch would carry all the water that came from Hot Springs Branch.

Q. What was the ditch used for, Mr. Bull?

A. To dry a part of the meadow, partly. They could only cut one part of the meadow with the water running on the other part. I don't know as I can explain fully; I can say they would turn the water on the other side of the meadow.

Q. Which side?

A. It don't matter, either side, and cut the side they turned the water off from, and turned it back and cut the other side.

* *

Q. What was the effect on the ground in the northeast part of section 8 after this ditch was constructed in 1886?

A. Oh, it made the grass grow. * *

Q. Now, during the time you were cutting hay on the west half of the northeast quarter of section 8, you say you diverted the water to the east half, through this ditch, marked on plaintiff's exhibit A, 'Ditch B.' What effect did that have on the west half of the northeast quarter?

A. Left it without water.

Q. Then, after the hay was cut, what did you do with the water?

A. Turned it back in the channel.

Q. And where did it go to?

A. Went down on the west half.

Q. Then that had the effect of drying the east half?

A. Yes, sir."

The witnesses A. L. Howell and J. W. Howard say that David Cleland, Sr., used the water flowing in Ditch B without stating the purpose for which it was employed. William Metzger, another witness for the same party, testified that in 1892, and the year following, he used the water from this ditch for his stock, which he pastured and fed on the land now owned by the defendant.

This constitutes the entire direct testimony, tending to show the purpose for which the water was diverted and used, and, except in 1891, when J. H. Bull cut the hay, there is an entire failure to show that the water was ever used for irrigation. There may be an inference that it was so used on the northeast quarter of the northeast quarter of section 8, from the statement that wild grass might not grow thereon without artificial application of water. This inference is weakened, however, by the testimony of David Cleland, Jr., whose attention having been called to that part of the land by the following question: "State whether or

not it will raise crops if not irrigated?" replied, "I don't think it would." We think a fair analysis of the testimony conclusively shows that Ditch B was constructed, and the water diverted thereby, not for the purpose of irrigation, but as a means of preventing it, during the haying season, from flowing in the channel of the east fork to and upon Cleland's hay land, thereby permitting the water to evaporate and to be absorbed, so that the crop could be harvested. The testimony shows that, from the fall of 1886 to 1894, Ditch B was probably the means adopted to drain the hay land, and the water flowing therein was used by Metzger, for two years immediately preceding the latter date, in caring for his stock. It is very doubtful, however, if the ditch was thereafter used until July, 1901, when the defendant reconstructed it. In speaking of the ditch in 1893 and the succeeding year, the defendant, as a witness in his own behalf, testified that it carried all the water of Hot Springs Creek at low stage, and referring to the ditch and the water which it carried, as compared with their condition in 1893 and 1894, he says: "I supposed they were always kept so; never knew they were not until I came back in October, 1900," when there was no water on the place. This ditch in 1901 was full of sediment, and in July of that year, when it was reopened, very heavy sods were plowed up. William Harvey, a witness for plaintiff, testified that, as lessee, he was in possession of the northeast quarter of section 8, and, referring to the time of his occupancy, was asked: "You may state if, during the period from 1899 to 1900, you ever observed such a ditch there?" and answered: "No, sir. I don't know of any ditch of that kind at that time. There might have been a low place there or something, maybe a little washout for a short distance, but no ditch that I know of."

1. The answer having alleged, as the basis of affirmative relief, a continuous adverse user for more than ten years of the water flowing in Ditch B for the purpose of irrigation, the burden of establishing that fact was thus imposed on the defendant. We think an examination of the testimony, the substance of which has been detailed, shows that after the death of David Cleland,

Sr., the water diverted from Hot Springs Creek by Ditch B was only used for irrigation in 1891.

2. In case of the death of a person who probably attempted to assert an adverse user of an easement, as his declarations to that effect would be in his own interest, and therefore inadmissible (*Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *Poorman v. Miller*, 44 Cal. 269; *Fischer v. Bergson*, 49 Cal. 294), the law, from the mere use, invokes a presumption that it was initiated under a claim of right, thereby imposing on the adverse party the burden of proving that the use was in pursuance of a license: *Rowland v. Williams*, 23 Or. 515 (32 Pac. 402). As the statute of limitations had not fully run at the time David Cleland, Sr., died, the use of the water for the remainder of the term of ten years should have been shown by testimony that clearly established that fact. A careful examination of it, however, convinces us that Ditch B was used only as a means of draining the hay land, and not for the purpose of conducting the water therein for irrigation, except during one season, and hence the continuation of the use of the water for that purpose must be denied.

3. The testimony further shows that a part of plaintiff's land is naturally irrigated by the water flowing in the channels of the branches of Hot Springs Creek, thereby producing grass and hay, which he needs in pasturing and feeding stock, in which business he is engaged. The use of the water by Ditch B for the purpose of draining the hay land on the northeast quarter of section 8 has not, in our opinion, been continuous for any period of ten consecutive years. As plaintiff and defendant are riparian proprietors on this stream, and each is entitled to an equitable share of the water thereof, we think defendant has failed to establish a right to maintain Ditch B, even to drain his hay land, when by doing so the water diverted thereby would deprive plaintiff of its reasonable use.

The decree will therefore be reversed, and one entered here enjoining the defendant from maintaining Ditch B, or diverting water thereby.

REVERSED.

Decided 9 January, rehearing denied 22 May, 1905.

CLARK v. HINDMAN.

79 Pac. 56.

REFORMATION OF DEED—CONSIDERATION.

1. An agreement to pay part of the cost of a building to be constructed on a designated lot is a sufficient consideration to sustain a suit to reform an error in the description, or, what is the same thing, to specifically perform by executing a corrected deed.

FAILURE TO FILE EQUITABLE CROSS BILL AS AN ESTOPPEL.

2. The failure of a defendant to present certain facts by cross bill, as an equitable defense to a law action, under Section 391 of B. & C. Comp., does not estop such defendant from subsequently asserting the same facts as a cause of an independent suit to obtain appropriate relief.

ESTOPPEL OF GRANTOR BY REPRESENTATIONS.

3. A grantor who has by his own conduct or statements influenced his grantee to so act with relation to the property conveyed that he will be injured if the grantor changes his position in the matter, is bound by his original acts, and estopped to claim otherwise.

This case affords an illustration of the rule: A father, in order to locate the eastern boundary of premises intended to be conveyed by him to his daughter, made certain measurements, pointed out to her the line which he supposed formed the eastern boundary of the land, and executed a deed to her based on such measurements. He thereafter put up a partition fence on the line so located, and in the absence of the daughter again measured the land, selected the site for the house, and superintended its entire construction thereon, she paying part of the cost. *Held*, that the father was estopped to subsequently deny that the line so pointed out and established was the true eastern boundary of the land intended to be conveyed.

From Baker: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by Phila B. Clark against W. C. and Tollie M Douthitt-Hindman to reform a deed and to enjoin the enforcement of a judgment. The facts are that the defendant W. C. Hindman, being the owner of a block of land in Baker City, conveyed a part thereof, September 7, 1891, to his daughters, the plaintiff, Phila B. Clark, and Grace C. Hindman, the deed expressing a consideration of \$500, and describing the premises as follows: "Bounded on the south by Court Street and on the west by Sixth Street, beginning at the southwest corner and running north 108 feet; thence east 86 feet; thence south 108 feet; thence west 86 feet to the place of beginning, the same in Boyd's First Addition." The plaintiff, having secured her sister's interest in the premises, erected a building thereon, a part of which, it is claimed by the defendants, extends east of the boundary of her land. Her father, having remarried, executed a deed for the remainder of his block to his wife, who commenced

an action against plaintiff and recovered judgment for twenty feet off the east side of the premises claimed by her, and this suit was instituted to prevent the enforcement of that judgment. The complaint states the facts hereinbefore detailed, and alleges that plaintiff erected her house on the site selected therefor by her father, under whose supervision it was constructed; that by mutual mistake the deed so executed September 7, 1891, erroneously describes the land as being in Boyd's First Addition to Baker City, when no such addition thereto ever existed; that at that time, and prior thereto, plaintiff's father intentionally represented to her and her sister, Grace, that a post forming a fence corner was the place of beginning designated in the deed; that having no knowledge to the contrary, nor means of ascertaining the fact, but relying upon his statements and believing them to be true, they paid him \$500 for the premises; that he measured the specified distance from such fence corner, and pointed out to them as their east boundary a line on which he constructed a partition fence; and that, by reason of such facts, her father and those claiming under him are and should be estopped to assert any claim or color of title to the land described in the judgment rendered against plaintiff.

The answer denies the material allegations of the complaint, and for a separate defense alleges that the deed was executed to plaintiff and her sister in pursuance of their agreement to pay one half the cost of erecting a house on the premises; that he put up a building on the western part thereof, incurring an expense of about \$1,000, of which sum they did not pay more than \$300; that it was intended by the parties to such deed to convey the land specified therein out of the southwest corner of his block, particularly describing it; that at the time the deed was executed the defendant believed that such block extended to the east line of Sixth Street, which was not then, nor has it since been, definitely located. For a further defense, it is averred that the deed described in the complaint was executed without consideration. The new matter in the answer having been denied in the reply, the cause was referred and the testimony taken, from which the court made findings, and decreed

a reformation of plaintiff's deed so as to describe the premises as follows: "Beginning at the southwest corner of the Hindman Block in Baker City, Oregon, thence north 108 feet; thence east 86 feet; thence south 108 feet; thence west 86 feet to place of beginning"; and that so much of the judgment rendered against plaintiff as interferes with the description last above given in any manner be enjoined, and both parties appeal.

MODIFIED.

For plaintiff there was a brief and an oral argument by *Mr. William Smith*.

For defendants there was a brief and an oral argument by *Mr. Francis M. Saxton*.

MR. CHIEF JUSTICE MOORE delivered the opinion of the court.

1. It is contended by defendants' counsel that, although the deed executed by Hindman to his daughters expresses a pecuniary consideration, they parted with nothing of value capable of being estimated in money, and, as the conveyance was intended as a donation, a suit to reform the deed cannot be maintained. The legal principle insisted upon finds expression in the statement that the specific performance of a contract to convey real property will not be enforced in equity unless it is supported by a valuable consideration: *Modisett v. Johnson*, 2 Blackf. 431; *Seymour v. Delancey*, 6 Johns. Ch. 222; *Vasser v. Vasser*, 23 Miss. 378; *Aston v. Robinson*, 49 Miss. 348; *Curlin v. Hendricks*, 35 Tex. 225. A court of equity will not interfere against a grantor, in favor of a volunteer, to correct a mistake or to reform a defective conveyance. The reason for this rule is stated by the court in *Adair v. McDonald*, 42 Ga. 506, as follows: "If there is a mistake or a defect, it is a mere failure in a bounty, which, as the grantor was not bound to make, he is not bound to perfect." Notwithstanding a diversity of opinion exists as to the right of a grantor to show a consideration different in kind from that expressed, evidence has been held admissible in this state to prove that a conveyance of real property by a deed reciting a valuable consideration was a gift, intended as an advancement, not to defeat the conveyance, but to show from

whence the consideration came, the money being treated as the original gift with which the land was purchased: *Velten v. Carmack*, 23 Or. 282 (31 Pac. 658, 20 L. R. A. 101). The rule announced in that case, however, is not applicable to the facts involved herein, for it will be remembered that the answer admits that plaintiff and her sister paid their father the sum of \$300 on account of the house which he built on the premises conveyed to them. The construction of the house made it a part of the realty to which it was attached, and, having been put up after the land was conveyed, the building became their property. Their agreement to pay one half the cost of erecting a house on the land to be conveyed to them was an executory consideration for the deed, which is sufficient to support it, and a failure on their part to perform the terms of their agreement does not invalidate the instrument, but merely furnishes their father a right of action against them for the consideration stipulated: *Lake v. Gray*, 35 Iowa, 459; *Gray v. Lake*, 48 Iowa, 505. Invoking the maxim that "Equity looks to the intent rather than to the form" (Pomeroy, Eq. Juris. § 363), the agreement entered into between Hindman and his daughters was in effect that he would erect a house on the land designated, and convey the premises to them, in consideration of their stipulation to pay one half the cost of the building, which afforded a valuable consideration for the deed.

2. It is also maintained by defendants' counsel that, in the action of ejectment brought against her, plaintiff had an opportunity to set up, by way of cross-bill, the facts now relied upon as the basis of equitable relief, but, not having done so, she is estopped by the judgment rendered therein. Our statute allows an equitable defense by cross-bill in actions at law (B. & C. Comp. § 391), and in construing this provision it has been held that a party may rely upon a legal defense without being thereby precluded from afterwards asserting his equitable title in an original suit: *Hill v. Cooper*, 6 Or. 181; *Spaur v. McBee*, 19 Or. 76 (23 Pac. 818); *South Port. Land Co. v. Munger*, 36 Or. 457 (54 Pac. 815, 60 Pac. 5).

3. Considering the case on its merits, the transcript shows that the southwest corner of block 14 of the United States town-site of Baker City has been established and is evidenced by an iron pipe driven in the ground. John Hagel, a surveyor, as defendants' witness, testified that on July 3, 1903, he measured west from this pipe 627 feet, as he construes the distance called for in Hindman's deed, at which point he located the southwest corner of the Hindman Block, and, continuing the line west 15.75 feet, he reached a corner of a fence running north; that, retracing the line 19.5 feet, he found an old fence post, and also saw evidence of a fence originally extending north therefrom; and that, measuring east from the corner so located 86 feet, the distance called for in plaintiff's deed, he found that the east wall of her house extends upon Mrs. Hindman's land 7.9 feet, the roof projecting about 18 inches further. The testimony of Grace C. Hindman, which was taken by deposition, shows that she was in Baker City when the house in question was built, but too ill to direct the carpenters doing the work; and that her father selected the site for the building, pointed out where the pillars supporting the corners were to be placed, and superintended the construction of the house. The deposition of Mrs. C. L. Kurtz shows that she was present when the site for plaintiff's house was selected, and saw her uncle, the defendant W. C. Hindman, measure the ground with a tape line and mark with a stick the points where the corners were to be placed, but she does not remember seeing pegs driven at the angles indicated; that her uncle superintended the construction of the building, where he spent most of his time each day until it was finished; and that he conferred with the witness as to the proper place to put a door in the house, and as to the color of the paint to be used thereon. Mrs. Anna Rutan testified that, immediately prior to commencing the work on the house spoken of, she saw W. C. Hindman measuring the lot on which it was to be placed, and, in answer to her inquiry as to what he was doing, he informed her that plaintiff wanted him to build a house for her. William Bostwick, a paper hanger, testified that W. C. Hindman showed him the different kinds of paper which the witness used in cover-

ing the walls of the various rooms of plaintiff's house. Eliza Barnes, Charles Barnes, and William Cunningham each testified that Hindman superintended the construction of his daughter's house.

When this house was built, plaintiff was not at Baker City, and she testifies that she did not select the site for the building nor have anything to do with its construction, except to pay the cost thereof, and not until about three years after it was finished did she know that it encroached upon her stepmother's land. It further appears that, prior to the building of plaintiff's house, Hindman put up a wire fence on what was supposed to be the boundary between his land and that of his daughter. This fence was removed so that the house could be erected, and plaintiff testified that her father, in referring to this fence, said: "That is the boundary between us." The deposition of Grace C. Hindman shows that this fence was put up prior to conveying her interest in the land to her sister, and in speaking of her father she testifies as follows: "He built a wire fence between his property and our lots. He took me to the place and showed me this wire fence, and said: 'This fence divides your and Phila's (plaintiff's) lots from mine.'" The defendant W. C. Hindman, in referring to plaintiff's statements as to what he said about the fence, testifies as follows: "I told her I supposed that that wouldn't be far from the line, but that there was no corners established at all, and explained it to Grace, also, when I gave her the deed, that the corner wasn't established." He further testified that he did not know any part of plaintiff's house was off her land until nearly a year after it was built.

It appears from the transcript that in the action brought by the defendant Mrs. Hindman, as plaintiff, against the plaintiff, Phila B. Clark, as defendant, a stipulation was entered into by the parties authorizing C. M. Foster, the county surveyor of Baker County, to determine the location of the house in question, and having done so, according to his theory, from an inspection of the deeds constituting the chain of title, he made a report of his survey, a copy of which was offered in evidence on the trial of this cause. This shows that on June 21, 1875, one J. M.

Boyd conveyed to W. W. Ellis a block of land beginning at a point 96 feet west of the southwest corner of block 14, in the United States townsite of Baker City, thence west 216.5 feet to the southwest corner, etc. Ellis, on December 24, 1875, conveyed to Parmela Boyd, the wife of J. M. Boyd, a tract of land beginning at the southeast corner of the Academy Block in Baker City, thence west 216.5 feet, thence south 125 feet to the southwest corner, etc. J. M. Boyd and wife, on June 30, 1877, conveyed to the defendant W. C. Hindman a block of land beginning at a point 80 feet west of the southwest corner of the block then owned and occupied by Parmela Boyd, thence west 216.5 feet to the southwest corner, etc. A plat of the blocks mentioned was also offered in evidence, an examination of which shows that the east line of the Academy Block is parallel with and 114 feet west of the west line of block 14 of the United States townsite of Baker City. It will be remembered that Boyd's deed to Ellis places the southeast corner of the premises conveyed at a point ninety-six feet west of the southwest corner of block 14. The deed from Ellis to Boyd's wife makes the northeast corner of her block identical with the southeast corner of the Academy Block, thus placing the premises described in her deed eighteen feet west of the land conveyed to Ellis. This discrepancy has been the cause of the uncertainty concerning the southwest corner of the Hindman Block. The judgment by which Mrs. Hindman recovered twenty feet off the east end of plaintiff's land probably resulted from the conclusion that the variance in the description of the premises was equal to the award, instead of eighteen feet as indicated.

The plaintiff testified that when she and her sister purchased the land from their father it was fenced on the south and west; that he and their brother measured with a tape line east eighty-six feet from a tree, supposed to be the southwest corner of the premises intended to be conveyed, and the description given in their deed was taken from the measurement thus made; that she secured the deed under the belief that the land measured by her father and brother in her presence settled the boundaries thereof; that her father built a partition fence on the line located by

such measurement; that in 1899 she first learned that any controversy existed in relation to the boundaries of her land, and thereupon moved her west fence about fifteen or twenty feet further west, and placed it in line with a fence her father had built north of her land, taking in a part of the street, which was then eighty-four feet wide, though the plat thereof showed a width of only sixty feet. The defendant testified that the distance is five feet and four inches from the post once forming the corner of the old fence, east to a tree, the circumference of which is sixty inches, but when it was set out it was very small. In referring to this tree, the witness says: "I considered it as no corner. I couldn't have planned it for a corner when I wasn't sure where the corner was."

The foregoing is a fair summary of the testimony given at the trial, the preponderance of which, in our opinion, shows that the defendant W. C. Hindman, in order to locate the east boundary of the premises intended to be conveyed to his daughters, measured east eighty-six feet from the tree standing near the post that then formed the corner of the old fence; that he pointed out to his daughters the line which he supposed formed the east boundary of their land, and, based on such measurement, he executed the deed to them; that he thereafter put up a partition fence on the line thus located; that in plaintiff's absence he again measured her land, selected the site for her house, and superintended its entire construction. Hindman, as a witness in his own behalf, denies each of these facts, but, as he is eighty-one years old, his contradictory statements probably result from a defective memory, due to his advanced age, rather than to his interest as a party in the decision to be rendered in this suit.

Based on these facts, which we think are established, the question to be considered is whether or not the acts of the defendant W. C. Hindman, performed in ignorance of the true location of the southwest corner of his block, and his representations in relation to the supposed east boundary of plaintiff's land, made without intent to deceive his daughters, estop his wife, as a subsequent grantee, to assert title to the land which she claims has been encroached upon by plaintiff's house. "A party," says a

text writer, "is estopped to deny the line between his own and the adjoining land to be the true line if he has sold and conveyed land up to such line, has pointed it out as the true line, and has induced the defendant to purchase up to such line": 2 Hermann, Estoppel, § 1133. The plaintiff and her father being equally innocent with respect to the location of the east boundary of the land intended to be conveyed, any loss caused by erecting the house on the site selected by him ought not to be borne by her: *Buchanan v. Moore*, 13 Serg. & R. 304 (15 Am. Dec. 601). When a party, under a misapprehension of his legal rights, by word or act, places another party in an attitude of hostility to such rights, he must submit to the loss which his conduct has occasioned: *Fahie v. Pressey*, 2 Or. 23 (80 Am. Dec. 401). Hindman, in ignorance of his own title, evidently encouraged plaintiff in expending money to build her house, and, having done so, he and those claiming under him cannot subsequent thereto assert such title to her injury: *Storrs v. Barker*, 6 Johns. Ch. 166 (10 Am. Dec. 316).

In discussing the rule announced in that case, Mr. Justice ANDREWS, in *Trenton Banking Co. v. Duncan*, 86 N. Y. 221, says: "It is not necessary now to consider what are the limitations, if any, to this doctrine. But, as a general rule, it would seem to be just that, if a person does an act upon the suggestion or request of another, the latter shall not be permitted to avoid the act when it turns out to the prejudice of an antecedent right or interest of his own, although the advice on which the other party acted was given innocently and in ignorance of his claim. The authorities establish the doctrine that the owner of land may, by an act in pais, preclude himself from asserting his legal title. But it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character. To authorize the finding of an estoppel in pais against the legal owner of land, there must be shown, we think, either actual fraud, or fault or negligence

equivalent to fraud, on his part, in concealing his title; or that he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part, as in *Storrs v. Barker*, 6 Johns. Ch. 166 (10 Am. Dec. 316), as to render it just that, as between him and the party acting upon his suggestion, he should bear the loss. Moreover, the party setting up the estoppel must be free from the imputation of laches in acting upon the belief of ownership by one who has no right."

No definition of an equitable estoppel can well be formulated that will include all cases that should properly come within its purview: *Horn v. Cole*, 51 N. H. 287 (12 Am. Rep. 111). In commenting on this subject in *McGovern v. Knox*, 21 Ohio St. 547 (8 Am. Rep. 80), it is said: "Probably no inflexible rule can be laid down defining the several conditions of its application in all cases. One condition, however, is fundamental and essential in every case, which is that the particular right or interest invoking the protection of the doctrine must have been influenced by the conduct, the encouragement, concealment, or denial of him who, or with whom one in privity, is sought to be estopped. Only parties and privies are affected by it, or can invoke its interposition." In *Rutherford v. Tracy*, 48 Mo. 325 (8 Am. Rep. 104), where the facts were similar to those in the case at bar, Mr. Justice WAGONER, in deciding the case, says: "If the grantor showed the purchaser the wrong lines, and was cognizant of his action on that information, and stood silent while a house was being erected and money expended, he directly led the purchaser into a line of conduct prejudicial to his interest, and should not now be heard in alleging anything to the contrary. Such acts would constitute an estoppel in pais."

Applying the legal principles thus announced to the facts involved herein, we think plaintiff is clearly entitled to the relief prayed for in her complaint. Her father having measured east from the tree in question 86 feet to locate the limit of her land, the line thus pointed out to her before her deed was executed, and west of which her house was built under his supervision, must be established as the true boundary on the east side of her premises. It will be remembered that Hagel testified that from the

corner of the fence, as it stood July 3, 1903, east to the corner of the Hindman Block as located by him, the distance is 15.75 feet, and that from such fence corner east to the old fence post it is 19.5 feet. The old post is therefore 3.75 feet east of the corner of the Hindman Block as located by Hagel. From the old post east to the circumference of the tree, which is 60 inches, the distance, as testified to by W. C. Hindman, is five feet and four inches. Assuming this tree to be 20 inches in diameter, the distance from the old post east to the center of the tree is 6.16 feet, and measuring east from the center of this tree 86 feet, or 95.91 feet east of the southwest corner of the Hindman Block as located by Hagel, fixes the southeast corner of plaintiff's land. As this tree must inevitably decay, the boundaries of her premises should be more permanently established. Her deed will therefore be reformed so as to describe the land intended to be conveyed by her father, as follows: Beginning at a point on the north boundary of Court Street, in Baker City, Oregon, 531.09 feet west of the southwest corner of block No. 14, in the United States townsite of that city; thence north 108 feet; thence west to the east boundary of Sixth Street, in Baker City; thence south 108 feet; and thence east to the place of beginning.

So much of the judgment secured by the defendant Tollie M. D. Hindman against the plaintiff herein, Phila B. Clark, as in any manner interferes with the description last above given, the defendants herein, and all persons claiming by, through, or under them, are perpetually enjoined from enforcing. With this slight modification in the description of the premises, the decree appealed from is otherwise affirmed.

MODIFIED.

Argued 3 January, decided 30 January, 1905.

BROOKWAY v. ROSEBURG.

79 Pac. 335.

CONSTRUCTION OF CITY CHARTER LIMITING INDEBTEDNESS.

1. A distinction exists between the restriction of a constitution or charter, prohibiting a municipality from "creating" an indebtedness in excess of a stated amount and one providing that the indebtedness "must never exceed" a stated amount, the latter not admitting of any exceptions except liabilities arising from tort: *Grant County v. Lake County*, 17 Or. 453; *Wormington v. Pierce*, 22 Or. 606; *Burnett v. Markley*, 23 Or. 436; *Dorothy v.*

Pierce, 27 Or. 373; *Municipal Sec. Co. v. Baker County*, 33 Or. 338, and *Eaton v. Minnaugh*, 43 Or. 465, distinguished.

IDEM—CONTRACT TO PAY IN "VALID WARRANTS."

2. A contract to pay an obligation in "valid warrants" is a contract to pay from the general revenues of the municipality, unless there is an agreement to look to some special fund, and the amount to be paid is an indebtedness within the meaning of a provision that the debts and liabilities "must never exceed" a stated sum.

From Douglas: HIERO K. HANNA, Judge.

Suit by B. Brockway against the City of Roseburg and others to enjoin the performance of a contract and for its cancellation. There was a decree as prayed for and the Roseburg Water & Light Co. appeals. Further facts appear in the opinion.

AFFIRMED.

For appellant there was an oral argument by *Mr. Wm. T. Muir* and *Mr. Geo. E. Chamberlain*, with a brief over the names of *Wm. T. Muir* and *Andrew M. Crawford*, urging, among others, these points.

I. Whether the contract in question creates an indebtedness or a liability, the amount thereof in each case is the same, and is payable only when earned. The authorities cited in subdivision II are equally applicable: *McBean v. Fresno*, 112 Cal. 159 (44 Pac. 358, 53 Am. St. Rep. 191, 31 L. R. A. 794); *Higgins v. San Diego Water Co.* 118 Cal. 524 (45 Pac. 824, 50 Pac. 670); *East St. Louis v. St. Louis Gas Co.* 98 Ill. 415 (38 Am. Rep. 97); *Valparaiso v. Gardner*, 97 Ind. 1 (49 Am. Rep. 416); *Grant v. Davenport*, 36 Iowa, 396; *Smith v. Dedham*, 144 Mass. 177 (10 N. E. 782); *Weston v. Syracuse*, 17 N. Y. 110.

II. Agreements for future or periodical payments are not indebtedness until service for the particular period has been furnished. The indebtedness is conditional upon performance: *Sackett v. New Albany*, 88 Ind. 476, 479 (45 Am. Rep. 467); *Valparaiso v. Gardner*, 97 Ind. 1 (49 Am. Rep. 416); *Crowder v. Town of Sullivan*, 128 Ind. 486 (13 L. R. A. 647, 28 N. E. 94); *Foland v. Town of Frankton*, 142 Ind. 546 (41 N. E. 1031); *Laporte v. Gamewell Fire Alarm Tel. Co.* 146 Ind. 466 (45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359); *Walla Walla Water Co. v. Walla Walla*, 60 Fed. 957; *Kiehl v. South Bend*, 76 Fed. 921 (36 L. R. A. 228, 22 C. C. A. 618); *Fidelity T. & G. Co. v.*

Fowler, 113 Fed. 560; *Walla Walla Water Co. v. Walla Walla*, 172 U. S. 1 (19 Sup. Ct. 78); *State v. McCauley*, 15 Cal. 430; *People v. Pacheco*, 27 Cal. 176; *Rome v. McWilliams*, 67 Ga. 106; *New Orleans Gas Light Co. v. New Orleans*, 42 La. Ann 188 (7 So. 559); *Wood v. Partridge*, 11 Mass. 488; *Smith v. Dedham*, 144 Mass. 177, 180 (10 N. E. 782); *Dively v. Cedar Falls*, 27 Iowa, 227; *Grant v. Davenport*, 36 Iowa, 396; *French v. Burlington*, 42 Iowa, 614; *Creston Water Works Co. v. Creston*, 101 Iowa, 687, 699 (70 N. W. 739); *Capital City Water Co. v. Montgomery*, 92 Ala. 366 (9 So. 343); *Utica Water Works v. Utica*, 31 Hun, 426; *Saleno v. Neosho*, 127 Mo. 627, 640 (30 S. W. 190, 27 L. R. A. 769); *Wade v. Oakmont*, 165 Pa. 479, 488 (30 Atl. 959, 962); *Deitzinger v. Tamaqua*, 187 Pa. 539 (41 Atl. 454); *Fenton v. Blair*, 11 Utah, 78, 86 (39 Pac. 485); *Ludington Water Supply Co. v. Ludington*, 119 Mich. 480 (78 N. W. 588); *Territory v. Oklahoma City*, 2 Okl. 158; *Stedman v. Berlin*, 97 Wis. 505 (73 N. W. 57); *Dillon, Mun. Corp.* (4 ed.), § 136a.

III. It is not necessary that a special fund (when one is required to be established) should be created prior to or contemporaneously with the execution of the contract: *Faulkner v. Seattle*, 19 Wash. 320 (53 Pac. 365); *Winston v. Fort Worth*, 47 S. W. 740; *Lincoln Land Co. v. Grant*, 57 Neb. 70 (77 N. W. 349); *Defiance Water Co. v. Defiance*, 90 Fed. 753; 20 Am. & Eng. Enc. Law (2 ed.), 1174.

IV. If the agreement to pay in warrants is not valid, the contract is not vitiated thereby. The city may pay in cash. The expenditure of the revenues of the city is within the discretion of the city: *Atlantic City Water Co. v. Atlantic City*, 48 N. J. L. 378 (6 Atl. 24); *Faulkner v. Seattle*, 19 Wash. 320 (53 Pac. 365); *Hitchcock v. Galveston*, 96 U. S. 341, 349; *United States v. Fort Scott*, 99 U. S. 159; *Chapman v. County of Douglas*, 107 U. S. 357; *Fort Worth v. Smith*, 151 U. S. 302; *Babcock v. Goodrich*, 47 Cal. 488; *Wade v. Oakmont*, 165 Pa. 479 (30 Atl. 959, 962).

V. The agreement to pay in warrants is valid. The contract provides that the city shall pay the installments as they accrue

in valid warrants. If warrants drawn upon the general fund are not valid, the contractual obligation of the city is to pay in valid warrants, that is with warrants drawn upon a special fund. This involves the creation of a special fund upon which the warrants are to be drawn, and dispenses with any suggestion of an indebtedness: *Faulkner v. Seattle*, 19 Wash. 320 (53 Pac. 365); *Graham v. Spokane*, 19 Wash. 447 (53 Pac. 714); *Hitchcock v. Galveston*, 96 U. S. 314-350; *Babcock v. Goodrich*, 47 Cal. 488, 489.

Conceding for the purpose of the statement that the city might so proceed or attempt to so proceed as to vitiate the contract, nevertheless the city cannot avoid its contract by any such methods. If there is a way in which the city can lawfully proceed or can be compelled to lawfully proceed by the person with whom it contracted, the contract will not be invalidated. If the contract would create an indebtedness beyond the limitation by issuing general fund warrants, it will be enjoined from issuing such warrants. By this method the city will be required to perform its contractual obligations. There ought to be civic as well as private integrity.

For respondent there was an oral argument by *Mr. Dexter Rice* and *Mr. Frank Williamson Benson*, with a brief to this effect:

1. An individual taxpayer may maintain a suit to enjoin the illegal diversion of public funds or property: *Burness v. Multnomah County*, 37 Or. 460 (60 Pac. 1005); *Crampton v. Zabriskie*, 101 U. S. 1070.

2. Equity will at the suit of a taxpayer restrain the council from proceeding in the matter when it is not exercising its discretion, but is arbitrarily wasting the public funds, since such conduct is a gross and manifest abuse of power amounting to a legal fraud on the taxpayer: *Avery v. Job*, 25 Or. 512 (36 Pac. 293).

3. Where the indebtedness of a municipality has reached the prescribed limit it cannot enter into a contract for the supply of light for a fixed annual sum if no steps are taken to raise by taxation the necessary money to meet the liability as it accrues: *Salem Water Co. v. Salem*, 5 Or. 30; *Eaton v. Mimnaugh*, 43

Or. 465 (73 Pac. 754); *Fulton v. Chicago*, 89 Ill. 282; *Prince v. Quincy*, 105 Ill. 138 (44 Am. Rep. 785); *Prince v. Quincy*, 128 Ill. 443 (21 N. E. 768); *State v. Atlantic City*, 49 N. J. L. (17 Am. & Eng. Corp. Cas. 592); *Davenport v. Kleinschmidt*, 6 Mont. 502 (13 Pac. 249, 16 Am. & Eng. Corp. Cas. 301); 15 Am. & Eng. Enc. Law (1 ed.), 1128; 1 Dillon, Munic. Corp., § 55.

4. It is generally held that the prohibition against the creation of indebtedness beyond a certain amount extends to and embraces debts incurred to be paid on a future date as well as those payable at once: *Salem Water Co. v. Salem*, 5 Or. 29; *Law v. People*, 87 Ill. 385; *Davenport v. Kleinschmidt*, 6 Mont. 502 (16 Am. & Eng. Corp. Cas. 301, 13 Pac. 249); *Wallace v. San Jose*, 29 Cal. 180; *Niles Water Works v. Niles*, 59 Mich. 311; 15 Am. & Eng. Enc. Law (1 ed.), 1130.

MR. JUSTICE BEAN delivered the opinion of the court.

1. This is a suit by a resident and taxpayer of the City of Roseburg to cancel and annul a contract between the city and the defendant, the Roseburg Water & Light Co., by which the city agreed to pay the latter for supplying it with light from January 1, 1902, to December 31, 1911, \$125 a month, in "valid warrants," on the ground that the contract is illegal and void because it creates an indebtedness or liability against the city in excess of the limitation contained in its charter, without making any special provision for meeting the monthly payments as they become due. The charter adopted in 1895 provides in section 33, subd. 34, that the city "shall not create any debts or liabilities which together in the aggregate shall exceed five thousand (\$5,000) dollars, which indebtedness is hereby authorized," and, by section 133, that, except certain specified obligations, the indebtedness of the city "must never exceed in the aggregate ten thousand dollars": Laws 1895, pp. 523, 533, 553. The latter section was amended in 1901 (page 41) so as to reduce the limitation from ten to five thousand dollars, so that, at the time the contract between the city and the defendant light company was made, the charter provided that the indebtedness of the city, except certain specified indebtedness, "must never exceed in the

aggregate five thousand dollars." These several provisions of the charter are a limitation upon the power of the municipality to become indebted. They were inserted in obedience to the requirements of the constitution (Art. XI, § 5), and are for the benefit and protection of the taxpayer, by requiring the municipal authorities to conduct its affairs substantially within the current revenues. The state constitution prohibits a county from "creating" an indebtedness in excess of a certain amount, and does not apply to involuntary indebtedness thrust upon it by operation of law: *Grant County v. Lake County*, 17 Or. 453 (21 Pac. 447); *Burnett v. Markley*, 23 Or. 436 (31 Pac. 1050); *Municipal Security Co. v. Baker County*, 33 Or. 338 (54 Pac. 174). But the language of the restrictive clause in the charter of Roseburg is that the indebtedness of the municipality "must never exceed" a certain amount, and the uniform holding of the courts is that any liability not arising from tort, by virtue of which the municipality is required to pay money, is within a prohibition of that kind, and void, if in violation thereof, without regard to the purpose for which it was incurred or contracted: 20 Am. & Eng. Enc. Law (2 ed.), 1172; *Eaton v. Mimnaugh*, 43 Or. 465 (73 Pac. 754), and authorities cited.

The aggregate amount to be paid under the contract between the City of Roseburg and the defendant corporation is \$15,000, and at the time it was made the city was indebted over and above the cash on hand, not including the excepted indebtedness, in the sum of about \$14,000, evidenced by divers and sundry outstanding warrants issued from time to time since June, 1898, and presented to the treasurer, and indorsed, "Not paid for want of funds." Under these facts, the contract is clearly void, within the doctrine of this court in *Salem Water Co. v. Salem*, 5 Or. 29. That was an action to recover a quarterly installment alleged to be due the water company under a contract for supplying the city with water for seventeen years at the rate of \$1,800 a year, payable quarterly. The charter prohibited the city from contracting "any debts or liabilities which either singly or in the aggregate exceeded the sum of \$1,000," and the court held that the contract created a present obligation on the part of the city to pay money

amounting in the aggregate to the sum of \$30,600 to the water company at future periods, and was therefore void, under the charter, inasmuch as no provision was made for the payment of the installments as they became due. The fact that the contract provided for a yearly rate of \$1,800—an amount in excess of the indebtedness limitation in the charter—does not distinguish the case from the one in hand, because the payments were to be made quarterly, and in amounts less than the indebtedness clause. Unless, therefore, the contract, in the opinion of the court, created a debt or liability in excess of the quarterly payments, it would not have been held void. Throughout the entire opinion the court proceeds upon the theory that the contract created a debt or liability against the city in violation of its charter, because the aggregate amount to be paid to the water company thereunder was in excess of the power of the city to contract. It is argued with much force that the decision is not in harmony with modern authorities, and that the better doctrine, and the one supported by the great weight of authority, now is that a municipality may contract for a term of years for light, water, gas, and the like, at an annual or periodical rental, notwithstanding the aggregate amount to be paid during the life of the contract may exceed the amount of the indebtedness limitation in the charter. This rule proceeds on the theory that under such a contract there is in fact no debt until the services are rendered, and the amount to be paid becomes due: *Walla Walla City v. Walla Walla Water Co.* 172 U. S. 1 (19 Sup. Ct. 77, 43 L. Ed. 341); *Valparaiso v. Gardner*, 97 Ind. 1 (49 Am. Rep. 416); *McBean v. City of Fresno*, 112 Cal. 159 (44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191); *East St. Louis v. East St. Louis G. & C. Co.* 98 Ill. 415 (38 Am. Rep. 97). In all these cases, however, it is either stated or clearly intimated that a contract as suggested is void unless the municipality can make the payments as they become due without exceeding its charter limits. At the time the contract now in suit was made, the City of Roseburg was indebted in a sum largely in excess of its charter limits, and therefore it could not issue a warrant in payment of the first month's rent without exceeding the limit of its indebtedness, and

hence the contract would be void under the doctrine invoked: *Prince v. City of Quincy*, 128 Ill. 443 (21 N. E. 768). It is therefore unnecessary to consider at this time whether the Salem Water Company Case should be overruled.

2. A claim is also made that, since the contract between the city and the defendant corporation provides that the monthly payments shall be made in "valid warrants," it contemplates that the city will provide a special fund for the payment of the warrants as issued, and therefore they are not to be considered as an indebtedness, within the meaning of its charter. Under the contract the monthly payments were to be made in warrants, and they would be no less the debt or obligation of the city when issued because the contract stipulated that they should be valid, than if it made no such provision. In either event, they would be the general obligation and debt of the city, to be paid out of money arising from taxation, or from other revenues applicable to such purposes. In *Eaton v. Mimnaugh*, 43 Or. 465 (73 Pac. 754), the act of the legislature under consideration required Union County to build a courthouse, and to levy a tax annually for five years for the payment thereof. The court held that the obligation thus sought to be imposed would nevertheless be the debt of the county, and void under the constitution. As suggested in that case, there are decisions holding that where, at the time a contract is made by a municipality, a fund on hand is appropriated for its payment, or where a fund has been provided for such payment, although not collected, or an appropriation has been made of an anticipated revenue, and the contract is made payable out of such fund or revenue, it does not create an indebtedness, within the meaning of the constitution or charter. In such case there is no general liability against the municipality, but the holder of the warrant or other contracting party agrees to look to the special fund for payment. There is no such provision in the contract before us, and certainly none can be inferred.

And finally, it is claimed that the contract sought to be avoided is in fact a mere modification of a previous contract between the city and the predecessor in interest of the defendant company,

made some years before. Such a defense is pleaded in the answer, but it is not, we think, sustained by the evidence. The present contract makes no reference to the former, and does not appear to be a modification or change thereof. It is a separate and independent contract, with different terms, provisions, and duration, and its validity must be determined by the conditions at the time it was made.

It follows that the judgment of the court below must be affirmed, and it is so ordered. **AFFIRMED.**

Argued 3 January, decided 30 January, rehearing denied 15 May, 1905.

SWEETLAND v. GRANTS PASS POWER CO.

79 Pac. 337.

EASEMENT—CONSTRUCTION OF GRANT.

1. A grant to a power company and its successors and assigns forever of the right to go on land on the bank of a river and construct an abutment for a dam, and to keep the same in repair, is a grant of an easement in fee, appurtenant to the grantee's plant and the realty on which it was situated, so as to pass to its successors, in view of the fact that at the time it was made the grantee was constructing on the opposite side of the river a plant to be operated by water power, and was constructing a dam for that purpose, to the knowledge of the grantor.

RECORD NOTICE—INSTRUMENT ENTITLED TO RECORD.

2. A deed granting an easement in fee is entitled to record, and, being recorded, is notice to subsequent grantees of the servient estate.

EASEMENT—TRANSFER OF AS AN APPURTENANCE.

3. An easement appurtenant, as, for example, the right to construct on a stated tract abutments for a dam, passes under a grant of the dominant estate without being specially mentioned.

EASEMENT NOT A PUBLIC FRANCHISE.

4. A grant by a private citizen of an easement on his property is not a public franchise or privilege, though it is used in connection with and as part of the means of rendering such a privilege useful.

CONDUCT CONSTITUTING AN ESTOPPEL.

5. The grantor of an easement who has acquiesced in a change of the point of use of the right granted, on the strength of which the grantee has expended appreciable sums of money, cannot afterward object to the making of repairs at the new point of use.

OVERFLOWING LAND—CONSTRUCTION OF GRANT.

6. A grant of the right to construct on land an abutment for a dam, "together with the * * right * * and privilege forever to flow the waters of said * * river back upon and over the said land of the (grantor) at * * all times as a result and in consequence of said dam * * without any claim * * for damages" by the grantor, "his heirs or assigns," is sufficiently broad to prevent an action by the grantor or his successor in title for overflowing the land.

From Josephine: HIERO K. HANNA, Judge.

This is a suit by W. I. Sweetland against the Grants Pass New Water, Light & Power Co. to require the removal of a dam

and for damages. Plaintiff appeals from a decree against him.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William C. Hale*.

For respondent there was a brief and an oral argument by *Mr. William Torbert Muir*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

Shortly prior to September 24, 1889, The Grants Pass Water, Light & Power Co. was incorporated and organized, and, in pursuance of its purposes, it very soon acquired from the Town of Grants Pass the franchise, right, and privilege of laying within its streets water and gas mains, and of erecting and maintaining therein electric light poles, and affixing thereto the necessary attachments and wires for supplying the town and its inhabitants with water and light for public and domestic use. In furtherance of its purposes, on the date mentioned, it obtained from Fred Geyer, who was then the owner of lots 5 and 6, of section 19, township 36 south, of range 5 west of the Willamette Meridian, as designated upon the government survey, and abutting upon the south bank of Rogue River, a deed, whereby, in consideration of \$50 and other advantages, he granted and confirmed unto the power company and its successors and assigns forever, viz:

"The full, free right, liberty and privilege to go upon and over such lands * * on the south bank of Rogue River opposite the Town of Grants Pass * * and there locate an abutment for a dam and to make the necessary excavations and to construct such abutment for a dam across said Rogue River, and to construct upon such land the necessary cribs and guards to such dam, and such abutments, and to construct said dam with such abutment on said land, and the right to forever repair, rebuild and maintain said dam, abutment, and cribs or guards on such land, and also the full, free right, liberty, and privilege of ingress and regress over and upon said bank and lands to construct, repair, rebuild and maintain said dam, abutments, and cribs or guards thereon, together with the full, free right, liberty and privilege forever to flow the waters of said Rogue River back upon and over the said land of the party of the first part any and all times as a result and in consequence of said dam across said river without any damages or claim or demand for damages upon the part of the

party of the first part, his heirs, or assigns, by reason of said abutment, cribs, guards, or dam, or of the flowing of the water over or upon any of the lands of the said party of the first part."

This deed was recorded in the record of deeds for Josephine County the day following. At the time of acquiring the grant, the power company was engaged in constructing a power house on the north bank of the river, and was, as stated by Boyington, the owner of the land upon which it was being built. It was also engaged in the construction of a dam running practically at right angles to the thread of the stream to the opposite bank, and it was for the purpose of securing the right of attaching the dam to the south bank, and so maintaining it, that the deed was obtained. It should be noted, also, as is shown by the testimony, that the dam was being built in connection with the power house as a means of utilizing the water in Rogue River as a source of power, in furtherance of the purposes for which the company was incorporated.

Soon after procuring the deed the dam was attached by an abutment at the south bank and completed. It remained in place, however, but a short time; and another was built slightly below, but with the bank abutments practically the same, which structure, and the water of Rogue River controlled by it, were utilized in connection with the power house. A year or so later the water carried away the south bank of the river, making a new channel around the abutment on that side. About 1893 or 1894 a new dam was constructed by extending a wing dam from the north approach of the old structure upstream some 700 feet, more or less, and connecting it with the south bank of the stream by crib-work at a point on the north margin of the plaintiff's premises, described in his complaint as containing 4.64 acres, which is perhaps, 1,300 feet above the original conjunction of said dam with such south bank. When this latter dam was built, and made to abut upon the present premises of plaintiff, Geyer was still the sole owner thereof, and especially of the 4.64-acre tract. He was cognizant of its construction, and it does not appear that he ever made any objection to abutting it upon his land at a different place from that where first attached. He was upon the stand for

plaintiff in the present case, and, if it had been so constructed without his consent or against his protest, undoubtedly the fact would have been developed. It does appear, however, that after the water washed around the south abutment, as first constructed, he consulted his lawyers, with a view to a recovery of damages, and was advised that he was without remedy, whereupon he testifies that he "gave up all, * * and I never said anything more about it." On August 26, 1897, Geyer contracted to convey the 4.64-acre tract to H. A. Corliss, and on June 5, 1899, conveyed to plaintiff and one Gray; they having succeeded to the interest of Corliss. Later, on June 13, 1901, Gray conveyed his interest to plaintiff; and, on the 14th of November following, plaintiff acquired the 1 $\frac{1}{4}$ -acre tract adjoining on the west, and abounding on the river.

This indicates the chain of title to plaintiff's premises, and, in the mean while, acquaints us with the persons interested along the south bank of the river. In about 1900 it became necessary to repair this latter dam, and it was in a manner reconstructed, concerning which plaintiff testifies that he never gave any consent to such reconstruction, and further that he objected thereto and to its further maintenance; but his more explicit declarations are that he objected to the manner of raising the water, and more so to the ill-advised way in which the company was protecting the bank. It is further shown that in the winter and spring of 1901-02 the river washed around the south abutment of the latter dam and carried away some of the improvements of plaintiff, and much of the surface of the soil, with the trees and shrubbery, covering about one acre in extent, resulting in much damage to the property. In the summer, however, after the institution of the present proceedings, the defendant constructed a pier still further inland upon plaintiff's premises, and extended the dam to a connection with it. Concerning this added structure the plaintiff was interrogated and answered as follows:

"Q. Did you make any objection at that time to any of the persons in charge, against going upon your land with further construction?

A. No; I didn't at that time.

Q. You may state to the court why you didn't, Mr. Sweetland.

A. Well, the reason why I didn't, I thought it would be no advantage to me or them either to leave it the way it was, and I knew my objection would be no good, because I had objected before—a verbal objection. I didn't go any further. I didn't use any force or anything of that kind. They never asked for any privilege, either, to build out there. They just went ahead and built it, the same as they always did. * *

Q. They proceeded with the work there without asking your consent?

A. Yes, sir; there never was any talk in regard to that that I had at all, that I remember of. * *

Q. What did you say to Mr. Brown about repairing that dam?

A. Well, I met him there one day. I don't know how it happened.

Q. Where?

A. At the dam there on this south side. And I told him, if he was going ahead and put that in there in the shape it was, he was going to wash me out, and I tried to get him to protect that bank there. He told me there was no use protecting that bank; those willows stood there, and firs and alders, and there was no danger of washing that out; all he was looking for was to get water; let the bank take care of itself; and he told me it was none of my business, anyhow, or something to that effect.

Q. What else did you say to him?

A. I don't know. We talked a good many times. I don't know what I said. That was one time, I remember, that I protested, and that was the answer I got. I talked with Clarke since.

Q. Your conversation there was that you wanted him to protect that bank?

A. Yes; if he put in the dam, I could not stop him. They were working there with a crew of men. I didn't try to stop it. That was all I could do.

Q. You didn't talk about stopping the dam construction, but about protecting the bank?

A. About raising the dam. I didn't go down and tell him he could not put it in. I wasn't going to try to stop him, because I knew I couldn't.

Q. You merely spoke to Brown about protecting your land?

A. If he was going to raise the dam, I protested against him raising the dam without protecting me. I did that.

Q. Did you suggest how it should be protected?

A. I don't remember.

Q. Didn't you tell him some rock should be put in, or something?

A. I made some suggestions. I don't remember what I said at that time.

Q. Were the suggestions you made at that time complied with?

A. No, sir.

Q. Didn't they do what you suggested should be done?

A. No, sir. They done what they suggested should be done.

Q. Do you remember what you suggested?

A. I might have suggested, and part of it might have been fulfilled, but all of it never was at any one time.

Q. When they were building that present pier you spoke of last year, did you object to that?

A. No, sir.

Q. You were perfectly willing for them to spend that money?

A. Yes, sir.

Q. You allowed them to do it?

A. Yes, sir; they never asked me. They never asked me about any of their business, and I had no objection to make to them.

Q. You wanted that done?

A. I wasn't particular about it.

Q. I thought you said in direct examination that you wanted that done?

A. I wasn't anxious to have just that much done; no. I wanted that done, and toeing put in to protect that land there, which wasn't done. * * Another thing I wanted done—I wanted toeing put in above that landing. I told Clarke about it—gave him my idea of it—so it would keep the water from going around. I told him what I thought ought to be done. I didn't tell him I wanted it done. It wouldn't do any good to tell him what I wanted."

Further in his testimony witness says: "I never objected to the old dam in there, because it was doing no damage"; the objection being merely to raising the height of it. This was the dam as constructed when plaintiff became the owner of the premises.

Corliss testifies that plaintiff objected to raising the crib dam (meaning the one constructed in 1893 or 1894); that plaintiff thought, from the way it was constructed next to the bank, that, if they raised it, it would cut the bank out; that witness was somewhat interested, and that practically both he and the plaintiff objected; that witness gave his reason to show how the dam should be fixed. Further he testifies that he did not know that he objected to raising the dam, but gave his ideas as to protecting

the bank, and that about this there was some difference of opinion. It is further shown that the dam was so raised as to cause the water to overflow plaintiff's land at an appreciably greater depth than formerly, that its first construction at its present locality was at a large expense, and that the improvements since made have cost the company several thousand dollars. In 1892 an action was commenced by one Dixon against the power company, resulting in a judgment and sale of all its property and franchises to him, as the purchaser. He in due time obtained a sheriff's deed thereto, together with the improvements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining; the right to construct the dam across Rogue River and connect it with the south bank being especially specified as an item of the subject-matter of the grant. Dixon subsequently conveyed to the new company, the defendant herein, which was incorporated and organized about September 2, 1893. In conjunction with this title there is in the record a deed from the old company direct to Dixon, so that his title did not depend alone upon the sheriff's deed. The purpose of this suit is to require the removal of the dam, and for damages incurred by its maintenance at the present location. Failing of relief in the circuit court, the plaintiff appeals.

1. We have attempted to give a resume of such material and pertinent portions of the testimony as is deemed essential to a clear understanding of the dominant and controlling questions involved. The first arising is respecting the nature of the grant from Geyer to the power company. Plaintiff's counsel contends that it is a mere easement in gross, personal to the grantee, incapable of assignment, and that it did not pass to the defendant as the successor and grantee of the old company, while, upon the other hand, it is insisted that the easement is appurtenant to the defendant's plant, and the realty upon which it is situated and operated. Technically, an easement in fee must be appurtenant to land. It is an incorporeal right, which, as the term implies, is attached to and belongs to some greater or superior right—something annexed to another thing more worthy, which passes as incident to it. But an easement in gross, where the

grant is to the grantee, his successors and assigns, is capable of assignment, and is therefore in perpetuity, though not technically in fee: 10 Am. & Eng. Enc. Law (2 ed.), 403; *Houston v. Zahm*, 44 Or. 610 (76 Pac. 641, 65 L. R. A. 799); *Pinkum v. City of Eau Claire*, 81 Wis. 308 (51 N. W. 550). The difference is said to be purely technical, and does not affect any substantial right in the premises. The grant, nevertheless, will be construed in the light of the attendant circumstances and conditions under which it was made, and no presumption that it is in gross will be entertained when it can be fairly inferred that it was the intendment of the parties that it should be appurtenant to some other or dominant estate; and, in this view, it may become appurtenant to an estate of the grantee, if such was the purpose of the grant. So it was held in *Hopper v. Barnes*, 113 Cal. 636 (45 Pac. 874), quoting from the headnote: "A right of way granted to one and 'his heirs and assigns forever' will be held to be appurtenant to land of the grantee, though not so expressed in the deed, and not a grant in gross to the person of the grantee, when it leads to such land, and, except for use in connection with it, would be a useless cul-de-sac, and where it has, both before and since the grant, been used solely for access to such land."

So, also in *Poull v. Mockley*, 33 Wis. 482, where a grant of the right to take water for family and other purposes out of the well on the grantor's lot, and to use a road three feet wide from the east line of such lot to the well, was to the grantee, "his heirs and assigns"—the grantee at the time owning the lot adjoining that of the grantor on the east—it was held, first, that the easement should, perhaps, be regarded as appurtenant to the grantee's lot; and, second, that if the easement was not appurtenant, but in gross, yet that it was in perpetuity, and was assignable by the grantee, and that his grantee acquired his rights in the easement. In its reasoning, the court says: "We cannot see any substantial reason for holding that an easement in gross cannot be assigned or transferred, especially when the language of the grant shows unmistakably that the intention was that it should be enjoyed by the grantee, 'his heirs and assigns.' There is surely no ground for saying that Fuchs (the grantor) only intended to grant a

personal right to Budinger, and to restrict the right to take water from his well to him alone. Such an inference would be wholly unwarranted from the language of the grant. In this case the defendant has become the owner of lot 9, and he has likewise acquired from Budinger the easement, unless the rule of the common law prohibits grants of that character. We do not think there is any such inflexible principle, and consequently sustain the grant in the present case." Of a kindred nature are *Goodrich v. Burbank*, 12 Allen, 459 (90 Am. Dec. 161), and *Moll v. McCauly*, 83 Iowa, 677 (50 N. W. 216).

Now, the purposes of the present grant, which, upon its face, appears to be an easement in perpetuity, are very apparent. At the time the power company was the owner of land on the north side of Rogue River, was constructing a plant to be propelled by water to be taken from the river, and was engaged in the construction of a dam across the river, with the intention of diverting such water and utilizing it for power purposes; and, finding it necessary for the completion of the improvement that it should acquire a right to abut the dam to the south bank, together with the right to maintain it and to raise the water in the stream, it procured from Geyer, the owner of the lands upon the south bank of the river, the grant in question. Geyer, of course, knew the purpose of the grant, and that the easement was to be used in conjunction with the power house and the realty upon which it was being constructed; and, the grant being to the power company and "its successors and assigns forever," it must be deemed, in the light of the attendant conditions and circumstances, and the acts of the parties, both before and subsequent to the grant, to be appurtenant to the plant and the realty upon which it was being constructed, as the dominant estate. All the indicia attending the grant are inimical to the idea or presumption that it was in gross, and intended as merely personal to the grantee and unassignable; and, by the very strongest inference and rational deduction, it must be held to be a grant of an easement in fee, appurtenant to the grantee's estate.

2. The grant being an easement in fee, the deed was entitled to record, and, being recorded, subsequent grantees of the servient estate must be held to take with notice thereof.

3. Again, such being the character of the grant, the new power company has acquired the interest of the old company by virtue of the conveyances heretofore noted: *Bank v. Müller* (C. C.), 6 Fed. 545.

4. It is suggested that the old power company was without competent authority to assign or transfer its special privileges and franchise granted to it by the Town of Grants Pass, and therefore, that the defendant, the new power company, has not acquired such privileges and franchise by virtue of such conveyances. If such be the case—a matter which we do not decide, as it is not deemed a point in issue—the rule is not inimical to that other rule that an easement appurtenant will pass with a grant of the dominant estate, even without special mention of the easement in the grant. The easement acquired from Geyer was not a special privilege or franchise acquired from the government or municipality, within the purview of the rule that counsel seek to invoke and have applied.

5. The next question presented relates to the changing of the place of abutting the dam on the south bank of the stream; it being insisted by plaintiff's counsel that, having once selected the place and location, and actually located the south abutment approximately opposite the power company's plant, the company was without authority thereafter to replace the abutment at another location, notwithstanding necessity required it, and hence that it is without right or legal authority to maintain such abutment at the place where it now stands, or to maintain the dam in its present locality. The position would be incontrovertible, were it not for the fact that Geyer and his grantees, including the plaintiff, have by their acts impliedly, if not expressly, assented to the change in such manner that they are now estopped to assert to the contrary: *Jaqui v. Johnson*, 27 N. J. Eq. 526; *Marsh v. Haverhill Aqueduct Co.*, 134 Mass. 106. Geyer, the original owner of lots 5 and 6, when the easement was granted by him to the power company, continued to be the owner of the locus in

quo of the final termination of the dam on the south bank of Rogue River, when the dam was relocated and reconstructed about the years 1893 or 1894; and he made no objection to such relocation or reconstruction, although he must have known of the fact, and that the company was expending money in furtherance of the project. The company continued to use such dam as so relocated and reconstructed for about six years or more, and no one seems to have disputed or controverted its right to maintain the structure until it began to make some repairs about the year 1900, when the plaintiff says he objected to such construction and maintenance. His further examination, however, is effective to develop the fact by clear deduction that the objection was not to the maintenance of the dam or the abutment where located, but to increasing its height, and to the manner in which it was being tied to the bank, and to the lack of bank protection. This, it seems to us, is tantamount to an assent to the maintenance of the structure at the place where the present dam is located; and not only did he not manifest his dissent to such maintenance, but he suggested and advised with the officers and employees of the company as to how and in what manner the abutment should be constructed to protect the bank and make it secure against the action of the water.

So, with Mr. Corliss, who was interested in the premises prior to the plaintiff's acquiring title thereto, his objection was not to the locus in quo, but to the manner of the maintenance of the structure, and to the lack of protection to the bank against injury by overflow. Under these conditions, and with the tacit, if not express, assent of the plaintiff, the company continued to expend large sums of money in making the structure permanent and substantial, and in a fair endeavor to protect the plaintiff from harm from inundation. And the plaintiff is now estopped to insist that the dam or its south abutment should be removed. As was observed in *Boynton v. Ress*, 8 Pick. 329, 332 (19 Am. Dec. 326), "the change of its original position, acquiesced in by the proprietors of the land, was justifiable, and will be presumed to be in accordance with the intention of the parties to the conveyance." In the present instance we must presume that it was in

accordance with the intention of the parties to the grant of the easement.

6. It is further insisted that the dam has been raised in height so as to overflow plaintiff's land to a depth greater than formerly, and that this should be inhibited. The evidence probably sustains the contention as to the raising of the height of the dam, but the grant is so broad in its terms as to indicate clearly an intendment to confer the right so to do. It reads, after giving the right to construct, repair, rebuild, and maintain the dam, abutments, and cribs therein, thus:

"Together with the full, free right, liberty, and privilege forever to flow the waters of said Rogue River back upon and over the said land of the party of the first part at any and all times as a result and in consequence of said dam across said river without any damages or claim or demand for damages upon the part of the party of the first part, his heirs or assigns."

These terms are explicit, and do not in any way limit the company in constructing the dam to any height it might deem proper, in so far as the plaintiff is concerned.

There is some contention that the instrument does not correctly express the agreement of the parties, and that its consummation was the result of fraud practiced upon the grantor. The complaint, however, does not make any mention of fraud in the premises, nor is it in any manner made the basis of recovery, so that inquiry concerning it is not germane to the issues under which the case was tried.

These considerations affirm the decree of the trial court, and such will be the order here.

AFFIRMED.

Argued 4 January, decided 30 January, 1905.

GARDNER v. WILEY.

79 Pac. 341.

AGENCY—ESTOPPEL.

1. Under the general law of estoppel an employer who permits his employee to sell goods as though he were an independent dealer, holding him out to the public as such, will not be permitted to deny his apparent position as against those who have dealt with him without notice of the facts and in good faith.

NOTES—NEED OF INDORSEMENT BY JOINT PAYEES.

2. Notes payable to more than one payee cannot be assigned except by the joint action of all the payees, nor can an undivided interest therein be transferred by any one or more payees less than all.

INDORSEMENT OF NOTES PAYABLE TO PAYEE BY A FIRM NAME.

3. A note payable to one by a firm or business name may be indorsed by him personally.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Bill of interpleader, wherein the plaintiffs were discharged and the money in court was ordered paid to C. S. Wiley, from which the Mihalovitch-Fletcher Co. appeals. AFFIRMED.

For appellant there was a brief over the name of *Paxton, Beach & Simon*, with an oral argument by *Mr. Nathan D. Simon*.

For respondent there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. J. Couch Flanders*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. This is a bill of interpleader filed by Gardner Bros. against Charles S. Wiley and the Mihalovitch-Fletcher Co. to have determined the conflicting claims of the defendants to the amount due on certain promissory notes given by the plaintiffs to the G. Winehill Anti-Trust Distilling Co., and subsequently transferred by Winehill to one Rosenberg, and by Rosenberg to Wiley. The facts are that in June, 1902, Winehill, who had previously been employed by the Crystal Springs Distilling Co., desiring to make some change in his business arrangements, entered into negotiations with the Mihalovitch-Fletcher Co., wholesale liquor dealers of Cincinnati, Ohio, for the handling of their goods in the States of Oregon, Washington, Idaho, Montana, and Wyoming. After satisfactory arrangements had been made, the Mihalovitch-Fletcher Co. suggested that Winehill do business under the name of George Winehill & Co.; but, as he had previously been working for a wholesale house belonging to the trust, he preferred the name of the Anti-Trust Distilling Co., and that was agreed upon by the parties. They thereupon entered into a written agreement designating the parties thereto as Mihalovitch-Fletcher Co., party of the first part, and the Anti-Trust Distilling Co., party of the second part. By the terms of this agreement the Mihalovitch-Fletcher Co. agreed to sell to the Anti-Trust Distilling Co. all the line of goods they manufactured or had for sale at certain prices, to keep the books of the distill-

ing company for the nominal charge of \$10 a month, to fill and ship orders as directed, bill out all goods, attend to all correspondence, and draw on customers as accounts became due. The distilling company was to give each month a note due four months after date for all goods ordered by it from the Mihalovitch-Fletcher Co. during the previous month, and remit to the latter all collections from customers, the amount thereof to be credited on the notes. If the collections were not sufficient to pay the notes of the distilling company at maturity, a further extension of two months was to be given, but the extension notes were to be paid in full when due, without further delay. If the Mihalovitch-Fletcher Co. had to buy goods in the market to fill orders, it was to receive ten per cent profit thereon. The distilling company was to take out and pay for wholesale and retail licenses, hire and direct all salesmen, and pass on all orders. Such orders were to be filled by the Mihalovitch-Fletcher Co. if it found them satisfactory. A monthly statement was to be rendered by the Mihalovitch-Fletcher Co. to the distilling company of all sales and collections, and it was to extend to the distilling company a credit of \$20,000, should the company use proper judgment in selling goods to responsible parties. The distilling company was to take out an insurance policy on its accounts, so as to provide against loss, and all accounts for goods sold were to belong to the Mihalovitch-Fletcher Co., the proceeds to be applied in payment of the bills and notes of the distilling company. This contract was signed, "G. Winchill for the Anti-Trust Distilling Co.," and "Mihalovitch-Fletcher Co."

After the making of the contract, Winchill traveled and sold goods under the name of the Anti-Trust Distilling Co., or G. Winchill Anti-Trust Distilling Co., within the territory mentioned, to whomsoever he pleased, and at such prices as he desired; sending his orders to the Anti-Trust Distilling Co., at Cincinnati, where they were filled from the goods of the Mihalovitch-Fletcher Co., but billed to the customers in the name of the Anti-Trust Distilling Co. On the first of each month the Mihalovitch-Fletcher Co. sent a statement or bill for goods previously ordered to Winchill, who made, executed, and delivered

to them a promissory note therefor. The business relations thus continued between the parties until some time in 1903, and during that time Winehill sold to the plaintiffs, for the Anti-Trust Distilling Co., goods of the value of \$789.76, for which he took their five several promissory notes, payable to the order of "G. Winehill Anti-Trust Distilling Co." These notes he subsequently sold and transferred to one Rosenberg, who assigned them to the defendant Wiley for collection. The position of the Mihalovitch-Fletcher Co. is that the name "Anti-Trust Distilling Co.," used in its dealings with Winehill, and under which he did business, was intended as a mere device to deal with the retail trade without offending the jobbers, and that Winehill was in fact nothing more than a traveling salesman of theirs, and therefore had no right to take notes in his own name for goods, or to transfer or dispose of such notes. Winehill, on the other hand, testifies that he was not a salesman, or in the employ of the Mihalovitch-Fletcher Co., but was doing business on his own account as the Anti-Trust Distilling Co., paying for such goods as he ordered from time to time from the Mihalovitch-Fletcher Co., and therefore owned and had a right to sell to Rosenberg the notes taken by him from the plaintiffs for goods sold to them. In this position Winehill is corroborated by the form of the agreement made by him with the Mihalovitch-Fletcher Co. and the subsequent course of dealings, but it is not necessary to decide that question in this case. In any event, the Mihalovitch-Fletcher Co. permitted him to do business under the name of the Anti-Trust Distilling Co., or G. Winehill Anti-Trust Distilling Co., holding him out as such company, and it is therefore estopped to deny his authority as against parties dealing with him without notice or knowledge.

It is admitted that the notes given by the plaintiffs to Winehill in payment of goods sold by him to them were valid and binding as between them and the Mihalovitch-Fletcher Co., and a complete settlement of their account, because they had no notice or knowledge of the alleged relationship between Winehill and the company, but acted and relied upon the apparent fact that Winehill was himself the proprietor and owner of the Anti-Trust Dis-

tilling Co. We think the evidence also shows that Rosenberg, who purchased the notes from Winehill, was an innocent purchaser for value, and without notice. Winehill had borrowed money from him from time to time prior to the transfer, and given notes therefor, signed, "G. Winehill Anti-Trust Distilling Co." The surrendering up for cancellation of these notes and the payment of \$200 in money was the consideration for the transfer to Rosenberg by Winehill of the notes given by the plaintiffs. There is no evidence that Rosenberg had at the time of the transaction any notice or knowledge that the Mihalovitch-Fletcher Co. had or claimed any interest in the notes in question, or that Winehill was doing business for them, or in any way connected with them. A contention is made that, because Rosenberg did not testify directly that in dealing with Winehill he relied upon the fact that he was doing business under the name of the Anti-Trust Distilling Co., he is not an innocent purchaser. The evidence is that Rosenberg had known Winehill for many years, and had from time to time loaned him small sums of money; that Winehill had given him notes for the money so borrowed, signed, "G. Winehill Anti-Trust Distilling Co.," and there was nothing in the transaction to lead Rosenberg to think that they were not genuine, or that Winehill was not the person he represented himself to be. The Mihalovitch-Fletcher Co. having permitted Winehill, according to their own testimony, to do business under the name of the Anti-Trust Distilling Co., and having held him out to the world as such company, cannot, we think, now question the validity of his acts as against Rosenberg, who dealt with him in good faith, without notice or knowledge of the alleged relationship between him and them.

2. The point is made that the notes given by the plaintiffs in payment for goods sold and delivered to them are made payable to G. Winehill and the Anti-Trust Distilling Co., and therefore Winehill alone could not assign and transfer them. The rule of law seems to be that, where a promissory note is made payable to two persons, one cannot assign the whole, or even his own moiety, but it can only be transferred by the joint indorsement

of the two payees: *Smith v. Whiting*, 9 Mass. 333; *Johnson v. Magnum*, 65 N. C. 146; *Ryhiner v. Feickert*, 92 Ill. 305 (34 Am. Rep. 130); *Wood v. Wood*, 16 N. J. Law, 428.

3. The notes in question, however, were not made payable to two persons. Winehill was doing business, as the evidence shows, under the name of G. Winehill Anti-Trust Distilling Co. The notes were so made payable. Winehill and the Anti-Trust Distilling Co. were, therefore, for the purpose of these notes, in legal effect, one and the same. The notes were in favor of Winehill, and could be assigned by him: *Bryant v. Eastman*, 7 Cush. 113; *Medway Cotton M'fry v. Adams*, 10 Mass. 360.

The judgment of the court below is affirmed. **AFFIRMED.**

Argued 11 January, decided 30 January, 1905.

YOUNG v. STICKNEY.

79 Pac. 345.

EFFECT OF TENDER AS AN ADMISSION OF TRUTH OF COMPLAINT.

1. Under Section 532, B. & C. Comp., providing for a written offer by defendant to allow a certain judgment to be entered against him, which must be accepted within a stated time, or it shall be deemed withdrawn, in which event evidence thereof shall not be received at the trial, such an offer is not, after failure to accept it, an admission at all, and the case stands as though no offer had been made.

PLEADING PERFORMANCE OF CONTRACT—WAIVER—ALLEGATIONS AND PROOF.

2. In an action to recover for a breach of a contract plaintiff must show whether he relies on a compliance with the contract on his part or on a waiver of compliance by defendant, and whichever is pleaded must be proved, under the rule that allegations and proofs must correspond.

WAIVER OF OBJECTION OF DEFECT OF PARTIES.

3. An objection because of defect of parties must be made at the first opportunity after the facts become known to the opposing party, or it will be waived; for example, when the defect first became known through the cross-examination of plaintiff, the objection was waived by waiting until after the return of the verdict to suggest it.

From Clackamas: THOMAS A. McBRIDE, Judge.

Statement by MR. JUSTICE MOORE.

This is an action by W. H. Young against H. O. Stickney to recover for services rendered, and also damages for an alleged breach of a contract. It is averred in the complaint that the parties entered into an agreement whereby plaintiff was to haul to a skidway certain saw logs to be cut by defendant, who was to pay him \$1.75 per 1,000 feet therefor, and promptly to remove all such logs from the skidway, so as not to delay the perform-

ance of the work; and that plaintiff duly kept all the conditions of the agreement on his part, and delivered on the line of the skidroad 232,980 feet of saw logs, for which the defendant became indebted to him in the sum of \$407.71, and had paid on account thereof only \$237.13, leaving due \$170.58.

“For a further cause of action against the defendant, the plaintiff now repeats each and every allegation of the first cause of action herein, and further alleges that the defendant, in violation of his part in the contract, failed and refused to remove the said saw logs delivered to plaintiff on the line of said skidroad, and allowed the same to accumulate until all available skidroads and delivery ground became blocked, and plaintiff was thereby, in the performance of his said contract, put to great and unnecessary expense thereby in making such delivery, and was compelled to, and did, haul a large portion of said logs over long distances, and on to other and more difficult grounds to haul over, and was compelled to, and did, make other and different rollways and skidways for the accommodation of said logs, and to the damage of the plaintiff in the sum of two hundred dollars.”

The answer denied the material allegations of the complaint, and, for a further defense, averred that the contract between the parties required plaintiff to prepare, haul, and deliver on the skidroad, or on skids beside it, such logs as defendant might cut and saw into proper lengths, for which he was to be paid \$1.75 per 1,000 feet; that defendant felled and cut into saw logs 125,974 feet, which plaintiff prepared and delivered as stipulated, for which there became due him \$220.13; that defendant also cut 86,382 feet and 9,382 feet of saw logs, respectively, which plaintiff prepared, and hauled the former short distances, but did not deliver them at the places agreed upon, and the latter he did not attempt to haul, for which service defendant was willing to pay, and offered him one dollar per 1,000 feet, or \$86.38, for hauling the former, and 50 cents per 1,000 feet, or \$4.69, for preparing the latter, notwithstanding he failed to perform his part of the contract and there was nothing due him thereunder for his labor; and that the money earned by plaintiff, together with that which defendant was willing to pay him for his labor, is \$311.20, of which he had received \$250.80. The

defendant, before the trial, served upon plaintiff an offer to allow judgment to be given against him for \$60.40, but, the proposal not having been accepted, a trial was had, and the jury found for plaintiff in the sum of \$170.58 on the contract, and \$125 as damages; and, judgment having been rendered thereon, the defendant appeals. **REVERSED.**

For appellant there was a brief and an oral argument by *Mr. William Torbert Muir*.

For respondent there was a brief and an oral argument by *Mr. Harvey E. Cross*.

MR. JUSTICE MOORE delivered the opinion of the court.

The plaintiff at the trial having introduced his testimony and rested, defendant's counsel moved the court for a judgment of nonsuit on the ground that the first cause of action stated in the complaint is based on an express contract, all the conditions of which, it is alleged, plaintiff fully performed, while the testimony shows a nonperformance, to excuse which he relies on the defendant's alleged breach of the contract without alleging such waiver. The motion was overruled and an exception saved, and it is contended that the court erred in refusing to grant the nonsuit. It is argued by plaintiff's counsel, however, that defendant's tender to plaintiff of the sum of \$60.40 in settlement of his demand is equivalent to an admission of the terms of the contract, and of its breach as alleged, thus leaving for determination only the amount of damages to which plaintiff was entitled. The legal principles insisted upon will be considered in their inverse order.

1. The statute regulating offers to compromise disputed claims provides that the defendant may at any time before trial serve upon the plaintiff an offer to allow judgment to be given against him for the sum therein specified. If the offer is not accepted within three days, it shall be deemed withdrawn, and evidence thereof shall not be received on the trial: B. & C. Comp. § 532. The defendant's offer was not accepted by plaintiff, and his refusal in this respect renders the proposed compromise as though it had never been made. It would not conduce

to the speedy settlement of actions if a plaintiff could decline such an offer until after he had secured a judgment, and on appeal urge the proposal as an admission of the cause of action as alleged, leaving for consideration only the sum claimed to be due him. A plaintiff ought not to be permitted thus to speculate on the outcome of a trial, and, whatever the rule may have been at common law in relation to the effect of a tender, our statute has wisely regulated the matter by providing that, if the offer is not accepted within three days, it shall be deemed withdrawn.

2. It is not alleged in the first cause of action stated in the complaint what quantity of logs defendant was to cut, or plaintiff to prepare and haul, so that the averment that the latter fully performed all the conditions of the contract to be kept by him is not inconsistent therewith. The plaintiff's theory of the case, as disclosed by the entire complaint, is that he hauled all the logs that were cut, but, in consequence of defendant's failure to keep the skidroad free from obstructions, he was damaged in the sum of \$200. As evidence of what the bill of exceptions shows, the court, alluding to the testimony given on this branch of the case, in charging the jury, said, "It is admitted by the plaintiff that there was a failure to deliver all the logs he agreed to deliver." "The rule," says Mr. Justice BEAN in *Long Creek Build. Assoc. v. State Ins. Co.*, 29 Or. 569 (46 Pac. 366), "is well settled that a plaintiff cannot plead performance of a condition precedent, and recover under proof of a waiver of such performance." In *Hannan v. Greenfield*, 36 Or. 97 (58 Pac. 888), it was held that the proofs must follow the allegations of a complaint, and that the averment that plaintiff had performed all the conditions of a contract precedent to his right to maintain an action could not be upheld on the introduction of evidence showing that his failure to perform his part of the contract resulted from a waiver thereof by the defendant. In *Durkee v. Carr*, 38 Or. 189 (63 Pac. 117), in discussing this subject, it is said: "The rules of the common law respecting the allegation of the performance of a condition precedent have been changed by our statute so as to permit a party to plead generally

that he had duly performed all the conditions imposed upon him by his agreement: Hill's Ann. Laws 1892, § 87. But when he relies upon a waiver of such performance by the adverse party, he should aver that fact, so as to let in evidence thereof." If the defendant failed promptly to remove the logs from the skid-way, so that plaintiff was prevented from performing his part of the contract, the latter, upon an averment and a proof of such neglect, was entitled to compensation for the labor performed, and also for the damages resulting from the defendant's breach of the agreement. The testimony introduced by plaintiff did not sustain the allegations of his complaint, and, there having been a failure of proof of his theory of the case, the court erred in refusing to grant a judgment of nonsuit.

The defendant's counsel, invoking the rule announced in *Gardner v. McWilliams*, 42 Or. 14 (69 Pac. 915), insist that, because the second count of the complaint repeats the averments of the first by reference thereto, it does not state facts sufficient to constitute a cause of action. We do not think it necessary at this time to determine the question presented, for, if the complaint be defective in not specifically alleging the facts relied on, it can be amended in this particular as well as in that to which attention has been called.

3. After the verdict was rendered, defendant's counsel filed a motion for a new trial, which, among other reasons therefor, states that the testimony disclosed that plaintiff had a partner in the work performed for defendant, who was not made a party. This fact appears from the testimony given by plaintiff on his cross-examination. At the time it was disclosed, defendant's counsel was aware of the existence of the partnership relation, and, if he desired to take advantage of the defect of parties, he should then have interposed some objection thereto; but, not having done so, he ought not to be permitted to speculate on the probability of a favorable verdict, and, if found to be adverse, seek to set it aside on that ground. He had an opportunity to raise this question when it arose, but, not having made any objection at that time, it was too late to do so when the motion for a new

trial was interposed. The defect of parties, however, can be cured at another trial by a proper amendment of the complaint.

The judgment is reversed and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

Argued 10 January, decided 30 January, 1905.

THAYER v. BUCHANAN.

79 Pac. 343.

ALLEGATIONS AND PROOFS MUST CORRESPOND.

1. The allegations of a pleading cannot be abandoned on a trial and some other defense substituted not stated in the pleadings. For example, under an answer to a mortgage foreclosure suit that part of the principal was a judgment fraudulently confessed by plaintiff as defendant's attorney, it is not competent to show that part of the principal was usurious charges for loans and extensions of time, as the testimony does not tend to support the pleading.

VALIDITY OF COMPROMISE SETTLEMENTS.

2. Where parties not under disability have equal knowledge of the facts, and are in dispute concerning their respective rights, a compromise settlement is final as to all matters included therein.

From Clatsop: THOMAS A. McBRIDE, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is a suit by Claude Thayer against Manius Buchanan to foreclose a mortgage given to secure the payment of a note for \$549.50, with interest at 8 per cent per annum, bearing date February 14, 1899. Two separate defenses are interposed: First, that the sole consideration for the execution of the note was a balance of \$37 due upon a certain judgment, the further sum of \$47.50, costs, and the accrued interest, amounting in the aggregate to \$108.20, but that defendant has paid plaintiff \$163.76 in excess of this sum; and, second, that in 1893 defendant applied to plaintiff for a loan of \$300, and obtained it through his instrumentality, but nominally from J. E. Sibley, for which defendant executed his note, drawing interest at 10 per cent; that defendant subsequently confessed judgment upon the note in favor of Sibley in the county court of Tillamook County for the sum of \$300, principal, and \$37, attorney's fees; that later, about September, 1894, defendant paid to plaintiff \$300, to be applied on the judgment, but that plaintiff failed to

give the proper credit therefor, and erroneously and fraudulently included the amount in the note sued on as part consideration thereof; that on the 23d day of September, 1894, plaintiff, without the knowledge or consent of defendant, and without his authority, and in fraud of his rights, pretending to act for and represent him as his attorney in fact, confessed in his name in the Circuit Court of the State of Oregon for Tillamook County a judgment in favor of one L. Coats, formerly L. Nolan, in the sum of \$130, for work, labor, and services alleged to have been performed as broker for the defendant, which amount of said judgment plaintiff also erroneously and fraudulently included in the note sued on, as part consideration; that defendant was wholly ignorant of the action of plaintiff in confessing said judgment in his name, and that neither Coats nor plaintiff ever rendered any services for defendant; that on the 8th day of August, 1895, plaintiff fraudulently conspired with Sibley to cheat and overreach this defendant, and procured an execution to be issued on the Sibley judgment, and certain real property of the defendant to be sold, and thereupon notified defendant of what had been done, and extorted from him the execution and delivery of the note in question, and that the only real consideration therefor was the sum of \$108.20 aforementioned; and that defendant has paid plaintiff \$163.76 in excess of the true consideration thereof, for which he prays judgment against the plaintiff.

The plaintiff, for reply, while denying specifically except as to the confession of the judgments alluded to, and the execution and sale of defendant's realty under one of them, alleges that in the month of December, 1898, the defendant was indebted to plaintiff in sums of money exceeding \$549.50, and that on the 5th of the month, the true amount due from defendant to plaintiff being in controversy, they settled and compromised the claims of plaintiff, whereby and in consideration whereof the note in question was executed and delivered, and the mortgage given to secure the payment of the same. A trial being had, and the decree of the circuit court being favorable to plaintiff, the defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William Mosby LaForce*.

For respondent there was a brief and an oral argument by *Mr. Frank J. Taylor*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

We find in the record correspondence leading up to the execution of the note and mortgage in suit of this nature: On December 5, 1898, the defendant wrote to the plaintiff:

"Since coming from Tillamook, I have made a close study of our matters and conclude to make you this offer: I will give you my note and mortgage due in two years at 8 per cent for \$549.57, for your good deed. If you take this offer let me know by letter at Woodlawn, Or., and so instruct your attorney at Portland and we can exchange papers."

On the 9th plaintiff wrote the defendant:

"The terms of settlement while somewhat under figures proposed, yet will be satisfactory to me. * * Would now suggest that you make a partial payment now, say \$100. That you have a bond for a deed, & the land be deeded back to you when the sum you mention, 549.57 & int. at 10 per cent is paid."

On December 17, 1898, the defendant replied from Seattle, Wash.:

"Yours of recent date was received in due time. * * I am anxious to attend to our matter as soon as I return home—say about Jan. 1. I would prefer a deed. * * If I never return J. H. Middleton will complete our trade."

In pursuance of this correspondence and further negotiations with Mr. St. Rayner, who was acting for the plaintiff, the note and mortgage were given, and, the deed spoken of having been executed and delivered to the defendant, the mortgage was given back, covering the same premises. The land is the same as sold under the Sibley judgment and bid in—whether by plaintiff or by Sibley does not certainly appear—but it was redeeded to the defendant under the agreement by which the note was given in pursuance of the alleged compromise. Up to this point there is no dispute in the testimony.

The central idea of the defense is that the note in suit was obtained by fraud, or, rather, to be more explicit, by the inclusion, without the knowledge of the defendant, of the two items specified in the pleadings, namely, the \$300 which it is claimed plaintiff omitted to credit on the Sibley judgment, and the \$130, the amount of the Coats judgment, which it is alleged plaintiff fraudulently, and without the knowledge or consent of the defendant, confessed in his name, and as his act and deed. The plaintiff acknowledges the payment of the \$300, and thinks it was only partially credited on the Sibley judgment, but says that, however that may be, St. Raynor was advised of it, and he presumes that defendant got credit for it in the final settlement. The defendant is positive that the \$300 payment was to be applied in full on the Sibley judgment, and that issuance of execution thereon and sale occurred after the payment, contrary to plaintiff's assurance that no such execution should issue without notice to him, so that as to this matter the parties are not in accord. The defendant is discredited, however, in his allegations and contention respecting the Coats judgment, as there was produced an authorization in writing signed by him, the signature whereof he now acknowledges, empowering the confession of such judgment as is exhibited by the record.

1. The defendant now declares, in effect, that the amount of the Coats judgment was made up of bonuses charged for loans of money and extensions of time for the payment thereof, made to defendant and for his benefit, which said bonuses, it is argued, were and are usurious and illegal, and could not, for that reason, constitute any legitimate consideration for the alleged compromise note in suit. Such a contention, however, is wide of the defense that the judgment was fraudulently confessed without his authorization or knowledge, which is, as we have seen, disproved by his own admissions.

2. There may be some irregularities in the confession both of the Sibley and Nolan or Coats judgments, but, in the view we have taken of the case, they can make no difference as to the result. We are satisfied that the note in suit was the result of a compromise and settlement between the parties, and that the

defendant at the time was fully cognizant of every item going to make up the amount. He says in his letter that since coming from Tillamook, where the plaintiff lives and does business, he has made a careful study of their matters, and concluded to make an offer to give his note for \$549.57, with interest at 8 per cent, and a mortgage to secure the payment of the same, the plaintiff to give his "good deed" to the premises; and we find that, although the plaintiff insisted upon different terms, more advantageous to himself, the defendant had his own way, and the settlement was made in accordance with his written proposition. Defendant admits that the bonuses, as he styles them, aggregating \$120 or \$130, were included in the settlement, thus indicating effectually that he had perfect knowledge of them and of the Coats judgment at the time; and finally he says that the settlement was consented to by him because he was not in circumstances to go into a lawsuit at that time, his business being in such a state that he could not well contest the matter then. This is tantamount to an admission of the settlement touching these two claims, which, it is alleged, were fraudulently included therein without his knowledge, and, at the last, defendant seems to rest his defense upon the idea of coercion, which is not satisfactorily shown to be the case. Upon the whole, we are convinced that the settlement was entered into with a full knowledge upon defendant's part of all the items going to make up the amount finally agreed upon between him and the plaintiff, and that he was not deceived or misled respecting any of them; and, the note in suit having been the result of such settlement, he is now precluded from controverting its regularity and binding effect in any particular.

Some usurious items may have been included in the settlement, and it looks very much as if such was the case, which would not in themselves support the note; but, as we have previously had occasion to observe, the pleadings set out no such defense, and we are therefore powerless to help the defendant, even on account of such demands. If there exists at the time of the compromise and settlement a mutual, bona fide difference or dispute between the parties touching claims honestly and in

good faith asserted, not arising as a matter of law, but from facts equally within the knowledge of both parties, so that neither has exercised an undue advantage over the other, then is the compromise and settlement final and conclusive between them as to all matters included therein. Of course, it is no compromise where one party knows that he has no claim, but deceives the other into believing he has, for, if one has no claim and knows it, the other party being deceived, he has conceded nothing by way of compromise; but, as has been aptly said, "he has cheated." So, also, if there was a mutual mistake or imposition through fraud, so that there has been included in the settlement an item or items for which no fair consideration in fact exists, the settlement ought to be held void *pro tanto*, the issue being properly presented for adjudication. In the absence of fraud or mistake, however, the compromise of bona fide claims equally within the knowledge of the parties concerned must be held final and conclusive of all matters going to make up the settlement: *Smith v. Farra*, 21 Or. 395 (28 Pac. 241, 20 L. R. A. 115); *McGlynn v. Scott*, 4 N. D. 18 (58 N. W. 460); *Prince v. Prince*, 67 Ala. 565; *Thompson v. Hudgins*, 116 Ala. 93 (22 South. 632); *Creutz v. Heil*, 89 Ky. 429 (12 S. W. 926). So we conclude in this case that defendant is bound by his settlement and compromise with the plaintiff, and that his defenses set up by his separate answers are without merit. The decree of the circuit court will therefore be affirmed. **AFFIRMED.**

Decided 18 July, 1904; modified 28 August, 1905.

HARRINGTON v. DEMARIS.

77 Pac. 603, 82 Pac. 14, L. R. A.

ADVERSE USE—LIMITATION OF ACTION.

1. A riparian owner claiming a right to use part of the water of a stream cannot assert an adverse right to any water as against an upper proprietor whose use has not been curtailed so that he has been called upon to notice the claim of the lower owner.

ADVERSE USE OF UNCLAIMED WATER.

2. The use by an upper riparian proprietor of water from a spring which is not tributary to the stream is not adverse to the rights of a lower owner on the same stream.

ARTIFICIAL CHANGE OF WATER COURSE—RIPARIAN RIGHTS.

3. Where the respective owners of different tracts of land, by a concert of action, remove a dam, and permit water from the springs of a swamp to run into a stream which the water from the springs had never run into

all the water flowing from springs on defendant's land, and ever since that time such water has been used adversely to plaintiff and to all other persons, and that during the last five years, owing to the diminution by natural causes of water flowing from these springs, the quantity now used by defendant is less than that originally appropriated by his predecessors. The reply having put in issue the allegations of new matter in the answer, a trial was had before the court, which found the facts, in substance, as alleged in the complaint, and, as conclusions of law deducible therefrom, that plaintiff was entitled to have all obstructions placed in the stream removed, so as to permit one half the water arising from the springs on Dorothy's lands, not exceeding sixty inches, to flow in the channel to his premises, where he could divert forty-eight inches into his ditch, and permit twelve inches to flow in the bed of the stream through his land, but in no event to take more than one half the entire flow, and that the defendant was entitled to use the remaining quantity after supplying that given to plaintiff, who was awarded damages in the sum of \$700 by reason of his deprivation of the use of the water; and, having given a decree in accordance therewith, the defendant appeals. MODIFIED.

For appellant there was a brief over the names of *Henry J. Bean*, *Stephen A. Lowell* and *Thomas G. Hailey*, with an oral argument by *Mr. Bean* and *Mr. Lowell*.

For respondent there was a brief over the name of *Carter & Raley*, with an oral argument by *Mr. James H. Raley*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

An examination of the pleadings, the substance of which is hereinbefore set out, shows that the controversy involved in this suit relates to the use of water from a stream by riparian proprietors; and, though appropriations of water are mentioned in the complaint and answer, no priority of possession of public land is alleged by either party as a foundation for a vested and accrued right to the use of such water (Rev. Stat. U. S. § 2339, U. S. Comp. St. 1901, p. 1437), nor is it averred by either party that, after the necessary demands of a prior appropriator had

been supplied, there remained a quantity which he appropriated: *Simmons v. Winters*, 21 Or. 35 (27 Pac. 7, 28 Am. St. Rep. 727).; *Carson v. Gentner*, 33 Or. 512 (52 Pac. 506, 43 L. R. A. 130); *Browning v. Lewis*, 39 Or. 11 (64 Pac. 304); *McCall v. Porter*, 42 Or. 49 (70 Pac. 820, 71 Pac. 976).

1. It will be remembered that the complaint states that plaintiff and his grantor had used the water in question more than ten years adversely to the defendant, but, as his land is situated on the stream below that of the defendant, and the testimony fails to show any recognition by the latter of his alleged right, his use has not been adverse to the defendant: *North Powder M. Co. v. Coughanour*, 34 Or. 9 (54 Pac. 223); *Bowman v. Bowman* 35 Or. 279 (57 Pac. 546).

2. So, too, the answer alleges that the water issuing from the springs on Dorothy's land was used by defendant adversely to plaintiff more than ten years prior to bringing this suit. If the water from these springs was never tributary to the stream in question, defendant's use thereof could not have been adverse to plaintiff, who, as a riparian proprietor, was never entitled thereto. The testimony shows that, though the volume of water flowing in the stream to plaintiff's premises was annually diminishing, his use thereof was undisturbed until about 1898, and, if it be conceded that the water from the springs on Dorothy's land originally formed a part of this stream, the defendant's interference therewith, not having been sufficient to enable him to invoke the statute of limitations, his use of the water could not toll the plaintiff's right thereto. This eliminates the question of adverse use by the respective parties, and confines the inquiry as follows: (1) What constitutes the waters of the stream flowing through the lands of the parties; (2) has the defendant, as a riparian proprietor, taken more than his share of the water of the stream; and, if so, (3) what damage has the plaintiff suffered in consequence thereof?

3. Considering these questions in their order, the testimony shows that one R. M. Dorothy owns the east half of section 21 in township 5 north, of range 36 east of the Willamette Meridian,

the defendant the west half of that section, and the plaintiff, the southeast quarter and the east half of the northeast quarter of section 20 in that township and range, except, however twenty-nine acres from the north end of the latter land, and also one acre therefrom on which a schoolhouse has been erected; that the Walla Walla River now flows westerly through the northern part of these sections near a bluff, but prior to 1870 it ran in an old channel about 200 yards south of its present bed; that a small stream, known as "Spring Branch," is found on defendant's land, and flows southwesterly to and through plaintiff's premises, emptying into the river at a point below. This branch was probably an older channel of the river, for, during freshets in the latter stream, before the channel was changed to its present bed, the water overflowed the banks on the south and passed down Spring Branch, and, to prevent the stream from permanently following such course, plaintiff's grantor, George De Haven, and others, constructed a dam on the south bank of the river on the line of the overflow. About fifteen acres of Dorothy's land was originally a swamp, in which brush and tules grew, and where the water during the entire year stood about three feet deep; but about 1884 he drained this marsh, and discovered that it was caused by three large springs therein. It is alleged in the complaint, and the court found, that the source of Spring Branch was the springs on Dorothy's land, though defendant maintains that the fountain head of this stream is a spring on his premises, and that the water from the springs on Dorothy's land never reached Spring Branch in any channel, and, this being so, the court erred in making its finding to that effect, and in rendering the decree based thereon. Each party introduced in evidence a map on which is severally delineated the land owned by the plaintiff, by the defendant, and by Dorothy; but no survey of the stream, river, old channel, or dams ever having been made, the charts do not coincide in important particulars, and hence neither can be adopted as correct, except in so far as the representations thereon are corroborated. The plaintiff contends that the dam placed in the stream, constituting an obstruction to the flow of water from the springs on Dorothy's land to his premises,

is built in the old channel. The defendant maintains, however, that the dam complained of is placed in Spring Branch, and permits as much water to flow to plaintiff's land as passed an old dam which was supplanted by the new structure, and that Spring Branch is separate from the old channel. Whether or not Spring Branch is a part of the old channel of the Walla Walla River is of no consequence, but the identity of the dam that produced the injury of which plaintiff complains is important.

Considering whether the water from the swamp on Dorothy's land ever found its way originally into Spring Branch, we think the preponderance of the testimony shows that it flowed westward therefrom on the surface into this stream, and also northward in the same manner into the old channel. When Dorothy drained this swamp, he dug a ditch therefrom northward, and conducted water into the old channel, and also made another ditch westward from the swamp to the boundary of his land, where defendant continued the conduit north, causing the water flowing therein to be discharged into the old channel. The marsh having been reclaimed, it was ascertained that the swamp was caused by three large springs, known as No. 1, which discharges its water westward, and Nos. 2 and 3, which emit their waters northward, and all now emptying into the old channel. This change in the flow of water from spring No. 1 probably causing a scarcity, George De Haven, plaintiff's grantor, Enoch Demaris, defendant's father and predecessor in interest, and one Highby Harris, who then owned land through which Spring Branch flowed, about 1885, removed a part of the old dam, built on the bank of the old channel to prevent an overflow, and let the water issuing from these springs flow down such branch, in which, as we understand the testimony, the greater part thereof has continued to glide for more than fifteen years, until the summer of 1900, when the dam was replaced, and the water from the springs conducted in the old channel to a dam built therein, where by means of a ditch it is diverted and used in irrigating crops and an orchard growing on defendant's land.

Mr. Gould, in his work on Waters (3 ed.), § 263, in elucidating the principle that water which does not flow in a channel is not subject to the rules regulating the rights of riparian proprietors, says: "But if a well-defined natural stream empties into a swamp or lake, where all definite channel is lost, and emerges again into a well-defined channel below, it is a question of fact, dependent upon the extent of the swamp or lake, whether it is the same stream; and, if it is, the owners of land upon the lower stream have riparian rights, and an owner of land upon the stream above the swamp or lake is not entitled to divert water therefrom to their injury." In the next section the learned author, discussing this question further, says: "A stream does not cease to be a watercourse, and become mere surface water, because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel." In *Case v. Hoffman*, 84 Wis. 438 (54 N. W. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937), it was held that the flowing of water upon and beneath the surface of lands between a natural lake of about sixty acres in extent, and a creek into which they discharge, constitutes a watercourse, where the flow is all in the same direction, and a part of the way along a distinct and plainly marked channel, although for some of the distance it spreads over wide reaches of marsh and swamp lands, and percolates the soil in many and most places between the lake and creek. To the same effect, see *Cox v. Bernard*, 39 Or. 53 (64 Pac. 860), and *Mace v. Mace*, 40 Or. 586 (67 Pac. 660, 68 Pac. 737).

Though there is a conflict in the testimony respecting the character of the original outlet from the swamp westward—some of the witnesses insisting that it was well-defined and others that the water flowed on the surface—we think it was in fact a watercourse emanating from the springs into a swamp of sufficient extent to render it and spring No. 1 tributary to Spring Branch. The water flowing in the outlet from the swamp northward into the old channel never originally reached Spring Branch, but when De Haven, Demaris, and Harris, by a concert of action, took out the dam, and let such water, together with that from spring

No. 1, into the branch, they thereby made these springs tributary to such stream, and subject to the rules of law applicable to riparian ownership: *Cottel v. Berry*, 42 Or. 593 (72 Pac. 584). In that case Mr. Justice WOLVERTON, in discussing the subject said: "It seems to be a rule of law that where owners of different parcels of land conduct water across the same in an artificial channel, and do not define their respective interests in the water, their reciprocal rights thereto are to be measured and determined as if they were riparian owners upon a natural stream." In *Burk v. Simonson*, 104 Ind. 173 (2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304), it was held that where a change is made in the flow of a natural watercourse, either artificially or otherwise, and riparian owners acquiesce in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, and precludes a restoration of the stream and its surroundings to their original condition. In the case at bar, we think the testimony warrants the conclusion that after defendant continued the west ditch north on his premises, so as to conduct the water from spring No. 1 into the old channel, the riparian proprietors removed a part of the old dam, permitting the water issuing from Dorothy's land to flow down Spring Branch, thereby making it tributary thereto and entitling them to a reasonable use thereof.

4. The parties being riparian proprietors, and entitled to the reasonable use of the water flowing in Spring Branch, including that issuing from the springs on Dorothy's land, the next question to be considered is whether the defendant has taken more than his share. In *Jones v. Conn*, 39 Or. 30 (64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634, 53 Cent. Law Jour. 128), Mr. Chief Justice BEAN, after reviewing numerous decisions involving the right of a riparian proprietor to use the water flowing through his land for irrigation, deduces the following conclusion as applicable to the arid region of the United States: "It is accordingly now quite generally held in this country and in England that, after the natural wants of all the riparian proprietors have been supplied, each proprietor is

entitled to a reasonable use of the water for irrigation purposes." In enforcing this rule, it is further said in the opinion: "For the protection of the rights of the several proprietors, it has even been held that a court of equity may, in a proper case, apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such a manner as may seem equitable and just under the circumstances." In *Harris v. Harrison*, 93 Cal. 676 (29 Pac. 325), it was held that the inquiry as to what constituted a reasonable use of the water of a stream for irrigating the land of a riparian proprietor was a question of fact, depending upon the circumstances appearing in each particular case; the court saying: "The larger the number of riparian proprietors whose rights are involved, the greater will be the difficulty of adjustment. In such a case the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these and many other considerations must enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream, so as to allow none to flow down to his neighbor."

In the case at bar it is impossible to determine from the testimony any of these elements, though it will be remembered that the complaint states that, after this stream crosses plaintiff's premises, it flows "on and to the lands of other persons." If others have any rights in or claims to the use of the water flowing in Spring Branch, it is needless to say that, not having been made parties, the decree herein cannot possibly affect them. If they are entitled to a reasonable use of water, defendant's rights as a riparian proprietor must necessarily be abridged just in proportion as theirs are judicially determined. The plaintiff having been decreed sixty inches of water, providing that does not exceed one half the volume flowing in the branch, the defendant has no cause to complain, because under no circumstances would he be entitled to more, assuming that the demands of the parties are equal. The testimony shows that in 1875 plaintiff's grantor dug a ditch so as to tap Spring Branch on the east bound-

ary of his land, and conducted water therein, which since that time and until August, 1900, has been used in irrigating about fifteen acres, which has been cultivated as an orchard, garden, lawn, and meadow. The plaintiff, as a witness in his own behalf, says that, if all the water from the springs on Dorothy's land flowed into Spring Branch, the volume therein would be about three feet wide and from seven to eight inches deep, and, in speaking of the capacity of his ditch, said it was about two feet wide and from two to three inches deep; and, the court having awarded him forty-eight inches of water for the purpose of irrigation, we conclude the quantity so decreed is the measure of his right. The decree, however, does not prescribe how such quantity shall be ascertained, but, as plaintiff's testimony seems to imply that he estimates it to be square inches of the vertical cross-section of the stream as it ordinarily flows, he is entitled to that quantity, without pressure, to be measured in a box twelve inches wide, placed in his dam on a grade as near as possible with the fall of his ditch, and the twelve inches decreed him in the bed of the creek will be measured in the same manner at his dam in a box of the same dimensions, set as near as possible on the same grade as the average fall of the stream as it flows through his land.

We think the weight of the testimony shows that the dam which confines in the old channel the water issuing from the several springs on Dorothy's land is the primary cause of the injury complained of. Such dam, and also the new one built on defendant's land, will be removed sufficiently to permit the quantity of water awarded plaintiff to flow to his premises, provided, however, it does not exceed at any time one half the volume flowing in Spring Branch.

This brings us to a consideration of the damages sustained by plaintiff. The trial court having visited his premises with the parties and their attorneys, allowed him \$700, but the considerations which led the court to award this sum are not contained in the transcript, although that comprises the entire testimony. The lowest estimate placed by any witness on the damage done was \$1,000, and it would seem that such sum ought to have been

awarded; but the defendant, not having insisted thereon at the trial in this court, is evidently satisfied therewith.

From these considerations, it follows that the decree is affirmed.

Decided 28 August, 1905.

ON REHEARING.

MR. JUSTICE MOORE delivered the opinion of the court.

5. A rehearing having been granted in this cause upon the question of damages alleged to have been sustained by the plaintiff, the writer, in company with counsel for the respective parties, visited the locus in quo and saw quite a volume of water flowing nearly across the defendant's premises, but entirely sinking into the ground before it reached plaintiff's land. It was claimed by defendant's counsel at the former trial in this court that the damage which plaintiff claims to have suffered was due to his failure to remove the sedimentary deposit in the bed of the stream near the east border of his land, so as to permit the water to flow to his premises from the point where it disappears. From the examination made we conclude that plaintiff's failure to secure water for irrigation resulted in part from his neglect to keep the channel free from debris. The primary cause of the injury, however, is attributable to the defendant's diversion of quite a quantity of water which for many years had constantly flowed to plaintiff's premises, and in consequence of such change many valuable fruit trees belonging to the plaintiff had died. Believing that the damages thus sustained could have been very much mitigated by an effort on plaintiff's part to conduct to his land the water that sunk into the ground, we conclude that the sum of \$300 would be a fair compensation for the injury directly traceable to the defendant, and the plaintiff will be allowed that sum, instead of the award made by the trial court.

The defendant's counsel complain of that part of the decree heretofore rendered by this court which directs the new dam built by their client to be removed sufficiently to permit water to flow to plaintiff's premises, asserting that to open this dam

would necessarily result in washing deep channels in the defendant's meadow, to his great injury, and they suggest that he be permitted, in case the former opinion in respect to the division of the water is to be adhered to, to conduct water in irrigating ditches or other channels to supply the quantity awarded. The means adopted by the defendant to bring the water to the premises of plaintiff must be unimportant, so long as the quantity necessary to supply the use is furnished at the proper place. The decree will therefore be that the defendant conduct to the place where the water sinks into the ground, in such channels as he may reasonably select, the quantity of water awarded to plaintiff, or that, upon the defendant's failure or refusal to comply herewith and to keep the water flowing in such conduits during the irrigating season, the new dam be opened as hereinbefore specified. The plaintiff is hereby licensed to enter the defendant's premises at the point where the water sinks into the ground to remove the sediment, and to conduct the water from that place to his land, doing as little damage as possible.

The decree of the lower court will therefore be modified in the particulars herein indicated, the plaintiff to recover his costs and disbursement in this court and in the court below.

MODIFIED.

Decided 3 January, 1905.

NORWICH INS. SOCIETY v. OREGON RAILROAD CO.

78 Pac. 1025.

JUDICIAL NOTICE OF RECORDS OF VOLUNTARY ASSOCIATIONS.

1. The custom of voluntary unincorporated associations to keep a record of their proceedings is so universal in the United States that the courts will take judicial notice thereof, and presume that such a record was kept; as, for example, of the proceedings of a meeting of the Master Mechanics' Association.

PAROL EVIDENCE TO PROVE MATTERS OF RECORD.

2. Parol evidence is not competent to show matters of record without accounting for the absence of the writing. For instance, where it is sought to show that a railroad company uses on its engines the spark arrester recommended by the organization called the Master Mechanics' Association, the record of the proceedings concerning such adoption is the best evidence of what was done, and oral statements on the subject are *prima facie* inadmissible.

HARMLESS ERROR.

3. Error in excluding evidence is harmless where other equally strong evidence to the same effect is received.

RAILROADS—FIRES—INSTRUCTION NOT ASSUMING FACTS.

4. Where it is shown that a fire was the result of the operation of a railroad train, an instruction that "it is not necessary that any specific act of negligence be pointed out, if the circumstances established are such as a jury may infer negligence from, such as running at a high rate of speed, working the engine hard, overloading it, or other acts indicating an unusual course in operating the engine," etc., is not erroneous, as assuming that the train was running at a high rate of speed.

RAILROADS—RUNNING RAPIDLY AS NEGLIGENCE.

5. The running of a train at a high speed cannot usually be said, as a matter of law, to be negligent, it being but a fact to be considered in connection with other circumstances.

ALLEGATIONS AND PROOFS—RAILROADS—FIRES.

6. The allegations in a complaint that the engine that caused the fire "was unskillfully and improperly constructed, and improperly and negligently managed by defendant and its servants, and, by reason of said improper and negligent management, large quantities of sparks were emitted," are sufficiently broad to let in proof of the character of the care and caution exercised by defendant's employees in managing the engine referred to as doing the damage, and whether they were negligent in the performance of their duties, and such instruction does not submit to the jury an issue without the scope of the pleadings.

RAILROADS—FIRES—INSTRUCTION AS TO USUAL CARE OF EMPLOYEES.

7. In an action against a railroad company for damages resulting from a fire caused by sparks from an engine, an instruction: "You have a right to take into consideration every fact and circumstance which tends to demonstrate * * the kind of care and caution usually exercised by defendant's employees in charge of the engine which is alleged to have set the fire," is not objectionable, since, if the jury should conclude that the employees in charge of that engine had usually been careless or negligent, they might with propriety infer that such employees were careless at the time the fire in question occurred.

From Umatilla: WILLIAM R. ELLIS, Judge.

Action by the Norwich Union Fire Insurance Society against the Oregon Railroad & Navigation Co., to recover the amount of damage suffered through the destruction by fire of some property insured by plaintiff. The facts are stated in the opinion. There was a judgment for plaintiff, and defendant appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. Henry F. Conner*, with a brief over the names of *William W. Cotton*, *H. F. Conner* and *Carter & Raley*, to this effect.

I. The proceedings of an association of the character of the Master Mechanics' Association may be proven by parol: 6 Thompson, Corporations, §§ 5175 and 7747: *Columbia Nav. Co. v. Vancouver Transp. Co.* 32 Or. 532 (52 Pac. 513); *Newell v. Borden*, 128 Mass. 31; *Ray v. Powers*, 134 Mass. 22, 25; *Wilcox v. Arnold*, 162 Mass. 577.

The Master Mechanics' Association, so far as was disclosed by the testimony of the witness Graham, was a voluntary association of individuals, formed for purposes of mutual benefit, and for the exchange of ideas. It does not appear from the testimony what officers it has, if any, nor whether it has an officer whose duty it is to keep a record of its proceedings. It does appear, however, that the association, as such, recommended the extension front end, and this was withdrawn from the jury's consideration by the ruling complained of. Presumably, the motion to strike was based upon the idea that there was written evidence of the proceedings of the association; but there is no evidence that this was the fact. So far as the court below or this court knows, there was no formal record of the proceedings, and certainly no obligation was imposed by law requiring one to be kept. That parol evidence is admissible in a case of this character, without regard to whether there is a formal record in existence or not, is well settled by the authorities cited.

II. Running at a high rate of speed is not a circumstance from which the jury might properly infer negligence: *Thompson, Corporations*, §§ 1873 and 2265; *Louisville & N. R. Co. v. Marbury Lum. Co.* 32 South. 745 (28 Am. & Eng. R. Cas., N. S., 68); *Railroad Co. v. Ferguson*, 79 Va. 241; *Hagen v. Chicago, etc. R. Co.* 86 Mich. 615; *Western Ry. Co. v. Sistrunk*, 85 Ala. 352, 358 (5 South. 79); *Nashville R. Co. v. Hembree*, 85 Ala. 483, 485 (5 South. 175); *Perdue v. Railroad Co.* 100 Ala. 539 (14 South. 366); *Omaha & Rep. Val. R. Co. v. Talbot*, 48 Neb. 627, 637 (67 N. W. 599).

III. The plaintiff must recover upon the ground of the particular acts set forth in the complaint: *Normile v. Oregon Nav. Co.* 41 Or. 177 (69 Pac. 928); *Babcock v. Chicago & N. W. Ry. Co.* 72 Iowa, 197 (33 N. W. 628); *Gulf Ry. Co. v. Johnson*, 67 S. W. 182.

For respondent there was an oral argument by *Mr. John J. Battery* and *Mr. John McCourt*, with a brief to this effect.

1. What strange aberrations the human mind is capable of, or is it that counsel for defendant imagines this court to be afflicted with legal strabismus? Spellman said, that some chan-

cellors had long consciences; that the chancellor's conscience was like the chancellor's foot; some had a long foot and some had a short foot, and we presume that it is the same with master mechanics. We refer to their knowledge and ability; not to their consciences. There is no law which authorizes them individually or collectively to bind us by anything that they recommend.

Counsel says that "parol evidence is admissible in a case of this character, without regard to whether there is a formal record in existence or not," and he says that this is well settled. Shades of Mansfield and Marshall! Parol evidence, or any kind of evidence! If there had been a resolution as long as the moral law, recommending the extension front end, it would not be admissible. Well settled to be admissible! Why, there is not a case in the books where anything of the kind has been admitted. No court would admit it.

All the cases cited by the defendant's counsel are cases where the voluntary association was a party. The evidence was offered as acts or declarations against the interest of the parties making them. It was evidence tending to show some contract or undertaking material to the controversy. Of course it was competent, but the question involved in the cases cited looks about as much like the question before this court as a bake oven looks like a threshing machine. We insist that there was no error in excluding that evidence and striking out the answer of the witness. As well might a railroad company try to prove that it is not a common carrier by a resolution of a lot of conductors, that they recommend that no railroad company be considered a common carrier, and that they do not consider them such. We have been unable to find a case directly in point, nor do we think any one ever attempted to introduce such evidence.

Now, those master mechanics, like Graham, if they recommended the extension front end, were simply voicing their opinions from what each had told the other, together, perhaps, with what they had learned from their own experience but how much was experience and how much was what somebody told them? Under such a rule the plaintiff would have no opportunity to

ascertain. No such rule exists, and it would be most detrimental to the administration of justice if this court, or any other court of last resort, should make such a rule. The recommendations of no society, of any kind, or character, or resolution as to what is the best, or what is good or bad, has ever been admitted in any case. There are master mechanics' associations, associations of engineers, conductors, firemen, brakemen, physicians and surgeons, artists, stock raisers of every kind, wool growers and manufacturers of every description, and there is not one case in the books anywhere which ever has held that the recommendations of such associations are admissible in evidence, and the court knows, as a matter of fact, that such associations are eternally resolving and recommending, and have been for centuries. If their resolutions or recommendations were evidence, some other older genius would have discovered it long ago: Rogers, Exp. Test., §§ 4, 5, 6, 13, 14, 20, 31, 43 and 45.

2. All the counsel's argument on the second assignment of error is based upon one expression. We submit that there was nothing in it. Then the counsel attempts to say that if there was evidence of running at a high rate of speed, that fact was not evidence of negligence, and he cites a lot of cases. They have nothing to do with the question before the court, and it is well settled, beyond any cavil, and has become text-book law, notwithstanding the great big capitals of the defendant's counsel, that running at a high rate of speed may be negligence. It is passing strange that counsel should take the trouble to enunciate in capitals as a principle of law a statement which is diametrically opposed to what is the law, and it is deplorable that a bright young man should have so little regard for himself and a profession of which it has been said, "Of law no less can be said than that its seat is in the bosom of God—her voice the harmony of the world."

Negligence is always a question of circumstances and conditions. Running an engine at sixty miles an hour down hill, through snow banks in an open prairie country, or through Death Valley, where nobody lives, and there is nothing to be burned, would not be negligence. Running an engine up a stiff grade,

on a curve, with a heavy load, along a string of powder mills and houses, and through a populous city, at twelve or fifteen miles an hour might be negligence. Courts have never undertaken to say what would be negligence, as a general rule, leaving what would and what would not be negligence (as circumstances and conditions in each particular case must necessarily diverge from the circumstances and conditions of every other case at some point) to the circumstances of each case. Each one must be determined by the facts and conditions peculiar to itself: *Koontz v. Oregon R. & Nav. Co.* 20 Or. 3, 19 (23 Pac. 820); *Gandy v. Chicago & N. W. R. Co.* 30 Iowa 420, 432 (6 Am. Rep. 682); *North Shore Co. v. McWillie*, 17 Kan. 511; *Kansas City, Ft. Scott, etc. R. Co. v. Chamberlain*, 61 Kan. 859 (60 Pac. 15, 17); *Martin v. Western Union R. Co.* 23 Wis. 437, 439 (99 Am. Dec. 189); *Brusberg v. Milwaukee, L. S. & W. Ry. Co.* 50 Wis. 232; *Wilson v. Northern Pac. Ry. Co.* 43 Minn. 519 (45 N. W. 1132); *Hockstedler v. Dubuque & S. C. Ry. Co.* 55 N. W. 74; Thompson, Negligence, §§ 1873, 1874, and 1875; Elliott, Railroads, § 1244.

3. It is hard to understand what the fifth and sixth points made in defendant's brief are intended to signify, and no elucidation is given by an examination of the authorities cited. Counsel says that the plaintiff must recover upon the ground of the particular acts of negligence set forth in the complaint. That would seem to be self-evident, but no particular acts of negligence are set forth. The allegations are very general ones, which plaintiffs in such cases have a right to make, because they cannot know the particular defects or the particular acts of carelessness which caused the fire, those being peculiarly within the knowledge of the defendant, its servants, agents and employees. If counsel was not satisfied with the general allegations of the complaint concerning the negligence, carelessness and improper running and managing of the engine, his business was to ask the court to require plaintiff to make them more definite and certain.

4. The court was eminently correct in telling the jury that they might consider the kind of care and caution usually exer-

cised by defendant's employees in charge of the engine which set the fire. What has the question as to identification of the engine got to do with that? What is the counsel trying to say? The question of the identity of the engine had nothing to do with this. The evidence of other fires by other engines the court excluded in this case; perhaps he was right. It was so palpable that those two engines set the fire that probably it was unnecessary to introduce cumulative evidence, and the court ruled it out. We can't conceive what counsel means by saying the engine in question having been identified, the kind of care and caution actually exercised had no relevancy. What difference does it make whether the engine was identified or not as to the care and caution which they used, as the kind of care and caution usually exercised by them would be matters which the jury would have a right to take into consideration in determining what kind of care and caution they used at the time of the fire, and it would not make any difference whether the engine was identified or not.

We submit that there is nothing in any of the errors assigned, and that this case ought to be affirmed. There was absolutely no reason for bringing this case here. It is palpable that counsel, who is well known to be industrious and laborious, has examined into each question. He has not misread the authorities which he cited; he understands them well enough. The counsel is very bright, quite ingenious, and sometimes quite disingenuous, but the statute has provided for just such appeals as this, which are frivolous. Defendant's brief is here for the purpose, perhaps, of escaping the penalty prescribed by the State for bringing a frivolous appeal, but we must submit this was frivolous. It is not here in good faith, and we do think the court ought to impose the penalty of the statute, the addition of ten per cent, and we respectfully ask this court to so order.

MR. JUSTICE WOLVERTON delivered the opinion.

This action is to recover damages for loss occasioned by fire alleged to have been caused by the negligent operation and management of a freight train and certain engines used for propelling it. The plaintiff recovered judgment, and the defendant appeals. The errors assigned for reversal arise upon the direction of the

court in taking an item of evidence from the jury, and upon certain instructions given on the submission of the case.

1. J. F. Graham, a witness for the defendant, testified that he was a master mechanic; that he had had many years of experience with various railroad companies in the motive power and car department, and had been for nine years in charge of the defendant's rolling stock; that he knew of no appliance that would entirely prevent the escape of sparks from locomotives; that the Master Mechanics' Association was an aggregation of master mechanics throughout the country, which met once a year; that all railroads in the country were represented at their annual meetings, at which different questions pertaining to locomotive construction were discussed; that the appliance for preventing the escape of sparks from locomotive stacks, known as the extension front end, in general use all over the country, was adopted by the railroads in general, and by the Master Mechanics' Association. Whereupon the following question was put to him, namely: "They (the Master Mechanics' Association) recommended the extension front end?" To which he answered: "Yes, sir." On motion of plaintiff's counsel, this answer was withdrawn from the jury, and the defendant predicates error upon the action of the court in that regard. It is insisted that this matter was pertinent to show that defendant had exercised due and reasonable care in selecting and adopting the most approved appliance in modern use for the prevention of the escape of sparks from its locomotives. This may be conceded. It is next argued that parol evidence is admissible to show the action of the association in making the recommendation. It is so familiar to those who have any knowledge at all of the manner of conducting the meetings of such associations, and the business transacted thereat, that minutes or records of the proceedings are kept, that it must be taken judicially to be the general rule and practice.

2. These minutes or records constitute, of course, primary evidence of what was done; and, in so far at least as they affect third parties—those not participating in or connected with the association or the business transacted by it—the better reason

would suggest that the best evidence should be produced, or, as is usual in other cases, its absence accounted for before admitting parol evidence of their contents, or it be shown that no minutes were kept before resorting to parol to show what was done. These observations would have no application, of course, where it was sought to impeach the record, for in such a case parol evidence is always permitted to show what was actually done. The objection to the admission of the parol statement was based upon the ground that it was not the best evidence, as well as upon its immateriality and irrelevancy, and, as the absence of the record or minutes of the association showing the recommendation was not accounted for, we think the statement of the witness was properly taken from the jury.

3. But however this may be, if we concede that there was error in withdrawing this particular proof, it would hurt so little that it would be scarcely perceptible, because the witness had previously testified that this arrester had been adopted by the railroads in general, and by this association, and, when it was asked if the association recommended the patent, the court said it could not permit the proof in that way; but proof in fully as strong, if not a stronger, form was already before the jury without objection. The error, therefore, is not well assigned.

4. The next assignment is based upon the ninth paragraph of the court's charge to the jury, which is as follows:

"It is not necessary that any specific act of negligence be pointed out, if the circumstances established are such as a jury may infer negligence from, such as running at a high rate of speed, working the engine hard, overloading it, and other acts indicating an unusual course in operating the engine—are things the jury may consider in determining whether or not the defendant was guilty of negligence."

An objection to the instruction is that it assumes a fact touching which there was no evidence tending to establish, namely, the running of the train at a high rate of speed. This, we are satisfied, mistakes the intendment of the court. The purpose is manifest not to charge the jury as though the running of the train at a high rate of speed was a fact in evidence, or as if there was evidence tending to prove the fact, but the expression was

employed as illustrative, merely, to indicate the manner and nature of the acts from which the jury might infer negligence in the absence of proof of any specific acts which in themselves would constitute negligence. In other words, the court instructed that direct proof of the identical act or acts of negligence that permitted the escape of fire and its communication to the building was not necessary, but, when it is seen that the fire was the result of the operation of the train, then that the jury may infer negligence, in the absence of any direct proof of the kind suggested, from any acts of the company's agents or employees indicating an unusual course, and calculated to contribute to the result. Then, as illustrative of such acts as may be so considered, the court enumerates, among others, the running of the train at a high rate of speed, not that they had a right to consider the fact as one attempted to be shown, and, if found to be true, that it would constitute a circumstance from which they could infer negligence. In this view, the instruction was not misleading, and therefore not error.

5. We may say in this connection that whether the fact of running a train at a high rate of speed is an act of negligence depends always upon the circumstances, environments, and conditions under which it is being so propelled. A case is hardly conceivable where it would be proper for the court to say that the running of a train at a high rate of speed is per se negligence, or within itself negligence as a matter of law; but, when connected with the environments, such as passing through a populous city, or in proximity to buildings highly inflammable, especially when used in connection with the operation of the road, and under conditions that cause the engines to labor excessively, and thereby emit unusual quantities of sparks and fire, it might constitute an act from which the jury could very properly infer negligence in the absence of direct proof. This seems to be the doctrine of the texts and the cases cited: 2 Thompson, Negligence, § 1873; *Perdue v. Louisville & N. R. Co.* 100 Ala. 535 (14 South. 366); *Gandy v. Chicago & N. W. R. Co.* 30 Iowa, 420 (6 Am. Rep. 682); *Hagan v. Railroad Co.* 86 Mich. 615 (49 N. W. 509); *Brusberg v. Milwaukee, L. S. & W. Ry. Co.* 50

Wis. 231 (6 N. W. 821); *Kansas City, Ft. S. etc., R. Co. v. Chamberlin*, 61 Kan. 859 (60 Pac. 15). That the court's instruction is readily susceptible of the construction we have given it is also inferable from other instructions in connection with which it must be read, notably the fourth, tenth, and nineteenth, and some others that follow.

6. The third and last assignment of error is predicated upon the twelfth paragraph of the charge. It is in language following:

"You have a right to take into consideration every fact and circumstance which tends to demonstrate, subject to the explanation of the defendant, the kind of care and caution usually exercised by defendant's employees in charge of the engine which is alleged to have set the fire, and also the sufficiency of the equipments for preventing the escape of fire used by the defendant on this train in operating the same, and to judge as to the probable state of repair in which the engines which hauled this train were."

Two objections are noted and relied upon. The first, briefly stated, is that the instruction submitted to the jury an issue outside the pleadings; and the second, that, the engines doing the damage having been identified, it was not proper for the jury to consider what the employees may have done usually, as bearing upon or having anything to do with what they did at the time the fire was communicated. It is alleged that the engine "was unskillfully and improperly constructed, and improperly, carelessly, and negligently run and managed * * by said defendant, and by its agents, servants, and employees, and, by reason of said * * improper, careless, and negligent management * * large quantities of sparks" "were emitted and ejected," etc. This is manifestly broad enough to let in proof of the nature and character of the care and caution exercised by such servants and employees in conducting and managing the particular engine or engines alluded to, and involved in doing the damage, and whether or not they were negligent in the performance of their duties. There was no attempt to instruct, as it seems to be inferred, that the jury might consider whether the company had employed unskillful agents and employees, or as to whether the employees were in fact unskillful, as contradistinguished from careless or incautious. The authorities cited, namely, *Babcock*

v. *Chicago R. Co.* 72 Iowa, 197 (28 N. W. 644, 33 N. W. 628), and *Gulf, etc., R. Co. v. Johnson*, 28 Tex. Civ. App. 395 (67 S. W. 182), go to that sort of case, but are without application here. The objection is therefore untenable.

7. As to the second, it should be observed that the term "usually" was applied to the employees in charge of the particular engines in question, not to the employees in general, or to those in charge of other engines; and the inference deducible from the instruction is that, if the employees in charge of this engine had usually been careless and incautious or negligent in running it, if the jury found such to be the case, they might reasonably conclude that they were negligent at this particular time; and in this interpretation there is no vice in the instruction, under whatever view we may take of the law as to whether it may be permitted to show generally that other engines had scattered fire at other times, or that other persons in charge of them were usually careless or negligent: *Lesser Cotton Co. v. St. Louis I. M. & S. R. Co.* 114 Fed. 133 (52 C. C. A. 95).

The judgment of the trial court should be affirmed, and it is so ordered.

AFFIRMED.

Argued 5 January, decided 30 January, 1905.

HILDEBRAND v. UNITED ARTISANS.

79 Pac. 347.

CORPORATIONS—SERVING PROCESS ON RESIDENT AGENT.

1. Under Section 55, B. & C. Comp., providing for service of process on a resident "agent" of a corporation under some circumstances, service on a nonresident fraternal benefit corporation may be made by delivering the process to one who, as secretary of the local branch of the organization, is required to receive assessments from members and remit them to the head office, to keep and report the record of the standing of local members, to notify the head office of the death of members and to return the complete proofs of death, such a person being an "agent" of the corporation.

VENUE OF ACTION ON LIFE INSURANCE POLICY.

2. Under a statute providing that a corporation may be sued in the county where the cause of action arose, a life insurance company may be sued on its policy in the county whereof its beneficiary was an inhabitant at the time of his death.

SUFFICIENCY OF RETURN OF SERVICE ON AGENT OF CORPORATION.

3. Where an action has been commenced against a corporation in the county where the cause of action arose, as permitted by Section 55, B. & C. Comp., instead of in the county where the company has its principal place of business, as provided by Section 44, B. & C. Comp., the return on the summons must show that service was made on one of the principal officers of the corporation, or state on what clerk or agent it was served, and the reason for such substituted service.

NECESSITY OF SHOWING WHERE CAUSE OF ACTION AROSE.

4. In order to confer jurisdiction over a corporation that has been sued in a county other than the one in which its principal office is situated, the record must show somewhere that the cause of action arose in the county of the venue. To illustrate: A life insurance corporation of M. county having been sued in D. county on one of its policies, a statement in the record that the company "executed and delivered" its policy in D. county, and that the same was accepted in that county, does not show that the assured died there, and thus it does not appear that the cause of action arose in the county of the venue.

From Douglas: JAMES W. HAMILTON, Judge.

Action by Robert Hildebrand, acting through J. S. Culver, his guardian, against the United Artisans, a fraternal life insurance organization, to recover the amount of a membership certificate issued to his father. Defendant appeals. REVERSED.

For appellant there was a brief and an oral argument by *Mr. Parrish L. Willis*.

For respondent there was a brief over the names of *Geo. M. Brown* and *John T. Long*, with an oral argument by *Mr. Long*.

PER CURIAM. This is an action by a minor, instituted by his guardian in the circuit court for Douglas County, against a private corporation, having its principal place of business in Multnomah County, to recover upon a benefit certificate issued by it, stipulating to pay plaintiff the sum of \$1,900 in case of his father's death. The complaint alleges that the defendant was organized under the laws of this State, and is engaged therein in mutual life insurance on the assessment plan; that in conducting its business it instituted at Roseburg, Oregon, a lodge, known as "Umpqua Assembly, No. 105"; that in consideration of the payment by plaintiff's father of the fees and charges prescribed, and of his compliance with the defendant's rules and regulations, it "there executed and delivered" to him a contract of insurance, a copy of which is set out, whereby he became a member in good standing in that assembly, and entitled to all the rights, benefits, and privileges of membership in the defendant corporation; that plaintiff's father, having fully complied with all the conditions required of him by it, died November 18, 1903; and that due proof of his death was made to the defendant within the time prescribed, but for more than sixty days thereafter it declined, and now refuses, to pay any part of the sum named in

the certificate. A summons was issued, and the sheriff of Douglas County certifies, in his return indorsed thereon, that he served it in that county upon the within-named defendant, the United Artisans, by delivering a true copy thereof, prepared and certified to by him, and also a copy of the complaint prepared and certified to by one of plaintiff's attorneys to Minnie Jones, the Secretary of Umpqua Assembly, No. 105, and agent of the defendant corporation; and that the reason he made the service upon her was because the president or other head of the corporation, secretary, cashier, or managing agent thereof, did not reside or have an office in Douglas County. The defendant's attorney, appearing specially, moved to set aside the service of the process on the ground that the court did not have jurisdiction of the body of the defendant; supplementing the motion by his affidavit, and that of the defendant's managing agent, to the effect that such service was not made upon its agent. A counter affidavit was filed by plaintiff's attorney, in which he sets out what purport to be the duties of a secretary of a subordinate assembly of the defendant corporation. Based on the showing thus made, the court refused to quash the service, and, for want of an answer or other pleading, rendered judgment against the defendant for the sum demanded, and it appeals.

1. The statute regulating the manner of securing jurisdiction of the person of a defendant is as follows: "The summons shall be served by delivery of a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, or by the county clerk, as follows: (1) If the action be against a private corporation, to the president or other head of the corporation, secretary, cashier, or managing agent, or in case none of the officers of the corporation above named shall reside or have an office in the county where the cause of action arose, then to any clerk or agent of such corporation who may reside or be found in the county, or if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent": B. & C. Comp. § 55. The affidavit of plaintiff's counsel states that Minnie Jones, as Secretary of Umpqua Assembly, No. 105, of the United Artisans,

was required to remit all moneys to the supreme assembly; to notify the supreme secretary when the death of a benefit member occurs, and to see that all blanks for proof of death are promptly filled out and returned to the supreme secretary; and semi-annually to make a report of all members in good standing, and of other items of interest. The affidavits of defendant's counsel and of its managing agent fail to state any facts from which the conclusion can be deduced that Minnie Jones was not an agent of the defendant. They are simply to the effect that she was not its agent or representative, and are nothing more than mere expressions of opinion, not amounting to the specifications of probative facts from which her authority, or want thereof, is to be determined. The question of agency is to be ascertained by considering the business transacted for, and the acts performed by, one person for another, with his previous authorization or subsequent knowledge and approval. Upon the proof of these facts, the conclusion is reached whether or not the agency existed at the time relied upon. This deduction is based upon evidence of the facts adverted to, and cannot be made to depend upon the opinions of witnesses, for that would be delegating to them the duty devolving upon the court.

Where the regulations of an association having a benefit department require the secretary of each local division to certify to the health of every applicant for insurance, to keep a correct list of the members of the benefit department, and to place therein the name of any member of an insurance department joining his division by transfer from any other division, such secretary is an agent of the association: *Dixon v. Order Ry. Conductors* (C. C.), 49 Fed. 910. In deciding that case, the court, referring to the duties which the secretary was directed to perform, says: "The list required to be kept by the local secretary could perform no office, except as an aid to the defendant in its transactions with its members. In these respects the local secretary is in no sense the agent of the assured. The acts required are for the benefit of the assurer, not the assured, and are done by the authority of the company, not of the member. The imposition of such duties upon local secretaries constitutes them agents of

the corporation, within the definition of the statute, for the purpose of service of process." To the same effect is the case of *Southwestern Mut. Ben. Assoc. v. Swensen*, 49 Kan. 449 (30 Pac. 405). We think the affidavit of plaintiff's counsel sufficiently shows that the duties required of a secretary of a subordinate assembly of the United Artisans made Minnie Jones an agent of the defendant corporation in Douglas County, so that a delivery of a certified copy of the summons and of the complaint to her was the service of process on it, and it remains to be seen whether the record affirmatively shows that the cause of action arose in that county.

2. "Where statutes," says a text-writer, "provide that an insurance company may be sued within the county in which the cause of action, or some part of it, arose, it is generally held that an action on a policy of life insurance is maintainable in the county where the insured resided and died": 11 Enc. Pl. & Pr. 384. The sum named in a certificate of a fraternal insurance association does not usually become payable until the death of the assured, upon the happening of which the persons designated in the certificate as the beneficiaries eo instante acquire a vested interest therein: *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189 (10 N. E. 79, 11 N. E. 449); *Hoeft v. Supreme Lodge K. of H.* 113 Cal. 91 (45 Pac. 185, 33 L. R. A. 174). The indemnity thus rendered payable by the happening of the condition is in the nature of personal property bequeathed by a testator; the policy representing the last will of the deceased, and the beneficiaries named therein personating the legatees. If the policy were payable to the decedent's estate, the sum specified would on his death become an asset thereof, and be subject to the law in relation to administration. In ordinary life insurance policies the cause of action necessarily arises when the right to the sum specified accrues by reason of the death of the assured, and the cause of action must arise in the county of which he at the time of his death was an inhabitant: *Bruil v. Northwestern Mut. Relief Assoc.* 72 Wis. 430 (39 N. W. 529).

3. All actions, except such as have been localized by statute (*Bailey v. Malheur Irrig. Co.* 36 Or. 54, 57 Pac. 910), must be

commenced in the county in which the defendant resides or may be found at the time it was instituted: B. & C. Comp. § 44. This section has been impliedly amended so as to permit an action to be brought against a corporation in the county in which the cause of action arose: B. & C. Comp. § 55. The residence of a corporation is deemed to be in the county in which it has its principal office or place of business, where it may at all times be sued. When the action is commenced in the county in which the cause of action arose, and not in the county where the corporation has its principal office and place of business, the return of the officer upon the process must show the reason for making the service in the manner pursued: *Holgate v. Oregon Pac. R. Co.* 16 Or. 123 (17 Pac. 859). The delivery of certified copies of the summons and complaint to an inferior agent of a corporation, outside the county of its principal office and place of business, is a substituted service of process, and the return of the officer must show the facts necessary to confer jurisdiction: *Caro v. Oregon & C. R. Co.* 10 Or. 510; *Weaver v. Southern Or. Co.* 30 Or. 348 (48 Pac. 167).

4. To enable a court to render a valid personal judgment against a foreign corporation by the service of process on an agent, it must appear somewhere in the record that the corporation was engaged in business in the State: *St. Clair v. Cox*, 106 U. S. 350 (1 Sup. Ct. 354, 27 L. Ed. 222); *Farrell v. Oregon Gold Co.* 31 Or. 463 (49 Pac. 876). The rule as to venue adopted by this court is that though a corporation, for the purpose of jurisdiction, may be engaged in business throughout the entire State, its residence, within the meaning of the statute (B. & C. Comp. § 44), is in the county where its principal office is located; and, while it may be sued in any other county than that of its domicile (B. & C. Comp. § 55), the right to maintain the suit depends upon the fact that the cause of action arose in the county in which the venue is laid. Such right is an exception ingrafted by implication on the general statute, and, to bring the notice home to a corporation which is to be imputed to it by the service of a process on an inferior agent, the record, by a parity of reasoning, and following the rule adopted in *Farrell v. Oregon Gold Co.*

31 Or. 463 (49 Pac. 876), must somewhere show that the cause of action arose in the county in which the action was brought.

The complaint states that at Roseburg, Oregon, the defendant "there executed and delivered" to plaintiff's father a contract of insurance. The benefit certificate shows that it was signed by the officer of the defendant corporation at Portland, Oregon, April 12, 1901. Eight days thereafter it was countersigned by the master artisan and secretary of Umpqua Assembly, No. 105. Immediately below their approval, but over the signature of the plaintiff's father, is the following indorsement: "I hereby accept this certificate and the conditions therein named." A contract is completed at the place where the minds of the parties meet and assent to the terms of the agreement. It is fairly to be implied from the contract of insurance that it was entered into at Roseburg, in Douglas County; but it is nowhere disclosed by the record that plaintiff's father, at the time the certificate was issued, was an inhabitant of that county. If this fact were manifest from an inspection of the record, it is possible that a continuation of his residence would be presumed until his death; but, in the absence of such showing, it does not affirmatively appear that the cause of action arose in Douglas County.

The judgment will, therefore, be reversed, and the cause remanded, with instructions to quash the service of the summons, and for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

Argued 2 February, decided 27 March, 1905.

STATE v. CLARK.

80 Pac. 101.

LARCENY—INDICTMENT—CHARGING SEPARATE OFFENSES.

1. The stealing of articles belonging to several persons at one time and place constitutes only one offense, and may be charged by one indictment, but the allegation must be definite, no presumptions being indulged.

INDICTMENT FOR LARCENY FROM DIFFERENT PERSONS.

2. An indictment alleging that defendants on a certain date "then and there being, and acting together, did then and there * * feloniously take, steal and carry away" several chattels belonging to two different persons, sufficiently alleges that the articles were taken at the same time and place.

From Harney: MORTON D. CLIFFORD, Judge.

R. E. Clark and John Lee Milam were convicted of horse stealing, and appeal. **AFFIRMED.**

For appellants there was a brief over the names of *Gammans & Malarkey* and *Biggs & Biggs*, with an oral argument by *Mr. Daniel J. Malarkey*.

For the State there was a brief and an oral argument by *Mr. Andrew M. Crawford*, Attorney General, and *Mr. J. W. McCulloch*, District Attorney.

MR. JUSTICE BEAN delivered the opinion of the court.

The defendants were convicted of the crime of larceny. They appeal, assigning as error the overruling of a demurrer to the indictment on the ground that more than one crime is charged therein. The charging part of the indictment is as follows:

"That said R. E. Clark and John Lee Milam on the 14th day of June, A. D. 1903, in the County of Harney and State of Oregon, then and there being, and acting together, did then and there wrongfully, unlawfully and feloniously take, steal and ride away and drive away and lead away one mare and two geldings, said mare and one of said geldings being then and there the personal property of Frank Miller, and said mare being of the value of \$150, and said gelding being of the value of \$125, and the other said gelding then and there being the personal property of one Harrison Kelly, and of the value of \$100, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

It is argued that the indictment charged two distinct offenses—one, the larceny of the property of Miller, and the other, the larceny of the property of Kelly—without alleging that they were committed at the same time and place.

1. It is elementary that an indictment must charge but one crime: B. & C. Comp. § 1308. But a person by a single act may accomplish two or more criminal results, or, perhaps more accurately speaking, one offense may be committed at one time and place to the injury of two or more persons: *Woodford v. People*, 62 N. Y. 117 (20 Am. Rep. 464); *People v. Milne*, 60 Cal. 71. It is therefore held by the weight of authority that the stealing of articles belonging to two or more persons at the same time and place constitutes but one offense, and may be so charged in an

indictment: *Rapalje, Larceny*, § 117; *State v. Magone*, 33 Or. 570 (56 Pac. 648); *Ben v. State*, 22 Ala. 9 (58 Am. Dec. 234); *People v. Johnson*, 81 Mich. 573 (45 N. W. 1119); *State v. Nelson*, 29 Me. 329; *Lorton v. State*, 7 Mo. 55 (37 Am. Dec. 179); *State v. Hennessey*, 23 Ohio St. 339 (13 Am. Rep. 253); *Fulmer v. Commonwealth*, 97 Pa. 503; *Hoiles v. United States*, 3 McArthur, 370 (36 Am. Rep. 106). It must be alleged, however, that the larcenies were committed at the same time and place. There is no presumption that, because they are charged to have been committed on the same day and in the same county, they constitute a single crime: *Joslyn v. State*, 128 Ind. 160 (27 N. E. 492, 25 Am. St. Rep. 425); *State v. Bliss*, 27 Wash. 463 (68 Pac. 87).

2. The indictment in this case, we think, sufficiently complies with the rule, by alleging that the articles belonging to the persons named were, as a matter of fact, stolen at the same time and place, and by the same act. It is charged that the defendants on a certain day and in the County of Harney, etc., "then and there being, and acting together, did then and there wrongfully, unlawfully and feloniously take, steal," etc. The repetition of the words "then and there," in connection with the words "wrongfully, unlawfully and feloniously," definitely fixes the time and manner of the taking, and shows that the larceny of the three horses was committed at one and the same time. This is equivalent to an allegation that the defendants did at the time and place specified, and as one transaction, commit the several acts charged.

In *State v. Bliss*, 27 Wash. 463 (68 Pac. 87), relied upon by the defendants, the indictment alleged that the defendant, in a certain county and on a certain day named, "then and there being, did steal," etc., and the court held that the words "then and there," as used in the indictment, were nothing more than an allegation that, on the day and in the county named, the defendant committed the crime, and did not state that the property alleged to have been stolen might not have been in different parts of the county, and taken at different times on the same day. In short, the words "then and there

being" had relation only to the day and county, and not to the time or manner of the taking. Here, however, the repetition of these words in the information shows that they were intended to relate to the time and manner of the taking, and to confine it to one and the same act. The judgment is affirmed.

AFFIRMED.

Argued 18 January, decided 13 February, 1905.

SMITH v. BAYER.

79 Pac. 497.

46 143
46 408

EFFECT OF INDORSING NOTE FOR COLLECTION—REAL PARTY IN INTEREST.*

1. By indorsing a negotiable note "for collection," or the like, the indorser makes the indorsee his agent with power to proceed in his own name, reserving to himself the beneficial interest and the right to maintain in his own name appropriate proceedings for his own protection, if advisable.

INDORSEE AS REAL PARTY IN INTEREST.

2. An indorsee of a negotiable note for collection is the real party in interest in the sense that he may maintain an action on the paper in his own name: B. & C. Comp. § 27.

RIGHT OF RESTRICTIVE INDORSEMENT.

3. Under B. & C. Comp. § 4439, providing that a restrictive indorsement confers on the indorsee the right to receive payment and to bring any action thereon that the indorser could bring, an indorsee of a negotiable note "for collection and return" is entitled to sue thereon in his own name.

DEFENSES TO ACTION BY RESTRICTIVE INDORSEMENT.

4. A restrictive indorsee of a negotiable note takes it subject to all equities that might have been asserted by the maker had it not been indorsed.

PAROL EVIDENCE TO VARY INDORSEMENT.

5. In an action by an indorsee of a note for collection, parol evidence that plaintiff was the actual owner of two sevenths of the note was inadmissible as tending to contradict the indorsement, which must control.

IDEM.

6. In an action in his own name by an indorsee of a note for collection, a payment to the indorser after the assignment of the note, is a good defense, even against a claim of partial beneficial ownership by the indorsee.

PRESUMPTION OF HARMFULNESS OF FALSE ISSUE.

7. It cannot be presumed that an instruction was harmless where it submitted to the jury an issue not made by the pleadings or presented by competent evidence.

From Multnomah: MELVIN C. GEORGE, Judge.

Statement by MR. JUSTICE BEAN.

This is an action by Milton W. Smith against J. C. Bayer and Peter Hobkirk on a promissory note for \$290, executed and delivered by the defendants to the Concordia Loan & Trust

*NOTE.—In 64 L. R. A. 581-624 is a monographic note, Who is the Real Party in Interest Within the Meaning of Statutes Defining the Parties by Whom an Action Must be Brought. See also 66 L. R. A. 967. REPORTER.

Co. of Kansas City, Mo., on January 30, 1896, due on or before August 1 following. The complaint alleges the execution of the note, its indorsement to the plaintiff before maturity, the making of certain payments thereon by defendants, and prays judgment against them for the balance. The answer admits the genuineness of the note, denies that it was indorsed to the plaintiff before maturity or at all, and affirmatively alleges that it remained the property of the payee named therein until after maturity, when it was transferred to the Fidelity Trust Co., and that thereafter the defendants paid the note to the trust company and satisfied it in full. The reply denies the allegations of the answer, and affirmatively pleads that at all the times mentioned the plaintiff was and now is the owner in his own right of two sevenths of the note, and since the 21st day of July, 1896, has been and now is the owner of the remaining five sevenths for collection. Upon the trial plaintiff produced the note, with an indorsement thereon as follows:

"Pay to the order of Milton W. Smith for collection and return to Concordia Loan & Trust Co.

A. D. RIDER, Treasurer.

O. K. F. AMELUNG."

He testified that he received the note in due course of mail from the loan and trust company, inclosed in a letter which the witness produced, and which stated in substance, that the note was remitted for collection; that he knew the signature to the letter, had seen the handwriting, and knew that it was the signature of the Concordia Loan & Trust Co., and the person signing it had authority to represent the company; that such person was and had been employed by the company for a good many years, doing business for it and exercising such authority; that witness knew that he had a right to make contracts in the name of and for the company; that he (witness) knew the indorsement on the note to be that of the payee; that Rider, who made it, was the treasurer of the company, and had done business for it as such for a good many years; that witness knew him personally, had seen him write, and knew that his signature to the indorsement was genuine; that

the other name to the indorsement was simply an "O. K.," or ratification by some one; that Rider is the treasurer of the company, and has always done its business. The note was then admitted in evidence over defendants' objection on the ground that the indorsement did not transfer such title to the plaintiff as would support an action thereon in his own name, and because the genuineness of the indorsement had not been sufficiently proved. The witness was also permitted to testify, over defendants' objection and exception, that he was in fact the owner in his own right of two sevenths of the note, and the court instructed the jury that any settlement made by the defendants with the payee or owner of the note after the indorsement thereof to the plaintiff would not be a defense against the plaintiff's two-sevenths interest therein, although it would be such defense against the other five sevenths. The verdict and judgment were in favor of the plaintiff, and the defendants appeal.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Ralph R. Duniway*.

For respondent there was a brief and an oral argument by *Mr. Milton W. Smith*, in pro. per.

MR. JUSTICE BEAN delivered the opinion of the court.

The record bristles with assignments of error. Indeed, it would seem that almost every step in the progress of the trial was objected to by the defendants, and exceptions saved to the rulings of the court. The questions thus raised are embodied in the record and discussed more or less in the brief. They are, however, mostly technical and without merit. There was, in our opinion, sufficient proof of the genuineness of the indorsement on the promissory note offered in evidence to make a prima facie case in favor of the plaintiff. The plaintiff, testifying in his own behalf, said that he was familiar with the signature of the loan and trust company, knew that the man who signed the indorsement was an officer of the company and had been doing business for it for many years, and that his signature to the

indorsement was genuine. The weight to be given to this testimony was, of course, for the jury.

The only points of real importance on this appeal are: (1) Whether the indorsement, being on its face "for collection and return" to the payee, vested plaintiff with such a title as will enable him to maintain an action thereon in his own name; and, if so, (2) whether the court erred in admitting parol testimony tending to show that plaintiff was in fact the owner of two sevenths of the note, and in instructing the jury that, if such was the case, any settlement with the payee or assignee subsequent to the date of the indorsement to plaintiff would be no defense as against plaintiff's two sevenths.

1. The indorsement of a promissory note by the payee with the words "for collection," or the like, is not strictly a contract of indorsement, but rather the creation of a power, the indorsee being the mere agent of the indorser to receive and enforce payment for his use. The title to the note and the proceeds thereof remain in the payee, and he may maintain suitable actions and proceedings to enforce his right: *White v. National Bank*, 102 U. S. 658 (26 L. Ed. 250); *Commercial Bank of Penn. v. Armstrong*, 148 U. S. 50 (13 Sup. Ct. 533, 37 L. Ed. 363); *Sweeney v. Easter*, 68 U. S. (1 Wall.) 166, (17 L. Ed. 681); *Williams v. Jones*, 77 Ala. 294; *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524 (17 South. 728, 54 Am. St. Rep. 59); *Central Railroad v. First Nat. Bank*, 73 Ga. 383.

2. There is, in the absence of a statute, some conflict in the decisions as to whether such an indorsee can sue in his own name. The weight of authority seems to be in favor of his right to do so: 4 Am. & Eng. Enc. Law (2 ed.), 274; *Freeman v. Exchange Bank*, 87 Ga. 45 (13 S. E. 160); *Roberts v. Parrish*, 17 Or. 583 (22 Pac. 136); *Falconio v. Larsen*, 31 Or. 137 (48 Pac. 703); *Selover*, Bank Col. § 28.

3. It is now so provided by statute in this State: B. & C. Comp. § 4439; *Selover*, Neg. Inst. Law, § 155; *Crawford*, Neg. Inst. Law, § 67. We are therefore of the opinion that the present action was rightfully brought in the name of the plaintiff.

4. It was open, however, as against him, to all defenses which could have been made if the notes had remained in the hands of the indorser, and the action had been brought by it: *Wilson v. Tolson*, 79 Ga. 137 (3 S. E. 900); *Leary v. Blanchard*, 48 Me. 269. The indorsement did not pass the title, nor did it deprive the defendants of any defense they may otherwise have against the note. It merely created the plaintiff the agent of the payee for collection with the right to sue in his own name. The plain meaning of such an indorsement, as said by Mr. Justice MILLER (*White v. National Bank*, 102 U. S. 658, 26 L. Ed. 250), is that the maker of the note "is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser."

5. Such being the effect of the restrictive indorsement and the character of the title acquired by the plaintiff by reason thereof, it necessarily follows that the court was in error in admitting evidence to contradict the contract of indorsement by showing that the note was not transferred to the plaintiff for collection as shown on its face, but that he actually owned two sevenths thereof in his own right, and in instructing the jury that a settlement made with the payee after the indorsement to plaintiff would be no defense against plaintiff's two sevenths. The contract of indorsement is in writing. The terms thereof are plain and unambiguous, and parol evidence is not admissible to vary or contradict it: *White v. National Bank*, 102 U. S. 658 (26 L. Ed. 250); *Leary v. Blanchard*, 48 Me. 269; *Howe v. Taylor*, 9 Or. 288.

6. The plaintiff's action is based on the indorsement, and not on any interest he may have in the note. He is made by the indorsement the mere agent of the payee for its collection. The defendants' obligation, notwithstanding the indorsement, is to the payee or subsequent owner of the note, and not to the plaintiff. If they settled and paid the note to the payee or assignee, such settlement is a complete defense to an action thereon by plaintiff as a mere agent for collection.

7. It may be suggested that, because the jury found a verdict in favor of plaintiff for the entire amount sued for, they must have found that the settlement alleged as a defense was never made, and therefore the error of the court in charging the jury in relation thereto was harmless. The ruling of the court upon this point and its instructions to the jury injected into the case an issue not proper to be tried, the result of which was to confuse and mislead the jury, and we do not think it can be said that the error was harmless.

From these views it follows that the judgment of the court below must be reversed, and a new trial ordered. Many of the other questions argued in the briefs will probably not arise on a retrial, and need not, therefore, be noticed at this time.

REVERSED.

Argued 12 January, decided 6 February, 1905.

DAVID v. MOORE.

79 Pac. 415.

WAIVING GENERAL DEMURRER BY ANSWERING.

1. Under the Oregon practice the objection that a cause of action is not stated in the complaint is not waived by answering: B. & C. Comp. § 72.

FALSE REPRESENTATIONS—SUFFICIENCY OF COMPLAINT.*

2. A complaint in which is charged the making of a contract whereby defendant, for a valuable consideration, was to show plaintiff a piece of vacant public land, title to which he could secure by complying with the homestead law, and that the land to which he was taken was not vacant, and he was unable to obtain it as a homestead because of mining claims thereon, shows a cause of action for false representations.

ACTION AGAINST BROKERS FOR FALSE REPRESENTATIONS AS TO LAND PROCURED FOR THEIR PRINCIPAL.

3. An action by a purchaser of land against the broker through whom he bought, for falsely representing the nature and title of the property, is not analogous to an action for breach of a covenant for quiet enjoyment, in the sense that no action can be maintained until there has been an ouster, for the broker is not a vendor.

FRAUDULENT MISREPRESENTATIONS—CAVEAT EMPTOR.

4. The rule that a party is bound by his conduct, based on personal knowledge or on available information, does not apply to cases where a vendor of real property makes representations concerning which the pur-

*NOTE.—See the following cases and annotations on this subject: *Hedin v. Minneapolis Med. & Surg. Inst.* 35 L. R. A. 417, with long note, *Expression of Opinion as Fraud*: s. c. 54 Am. St. Rep. 628; *Fargo Gas & Coke Co. v. Fargo Gas & Elec. Co.* 37 L. R. A. 593, with note, *Right to Rely on Representations Made to Effect a Contract*; *Stackpole v. Hancock*, 45 L. R. A. 814; *Cottrill v. Krum*, 18 Am. St. Rep. 549; *Prewitt v. Trimble*, 36 Am. St. Rep. 586; *Kountze v. Kennedy*, 49 Am. St. Rep. 651, 29 L. R. A. 360; *Nash v. Minnesota T. I. & T. Co.* 47 Am. St. Rep. 489, 28 L. R. A. 753; *Boddy v. Henry*, 53 L. R. A. 769 (with briefs); *Henry v. Dennis*, 85 Am. St. Rep. 365, with monographic note, *Liability for Misrepresentations Directly and Indirectly Made to the Complaining Party*.

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chaser has neither knowledge nor means of knowledge. This is an instance: Where defendant was employed to find plaintiff unclaimed government land which he could locate as a homestead, and showed plaintiff a tract which he was unable to secure because it was already claimed as mineral land, the fact that there were evidences of mining claims on the land when plaintiff examined it does not prevent plaintiff from suing for breach of contract, defendant having falsely represented that the mining claims had long since been abandoned, and would be no obstacle to securing the land as a homestead, and plaintiff being wholly unfamiliar with mines.

FALSE REPRESENTATIONS—DEFENSES.

5. The non-mineral affidavit filed by plaintiff in making his homestead entry does not prevent him from suing defendant, whom he had employed to locate him on public land, for false representations in relation to such location, where plaintiff testified that he made such affidavit relying on the representations made by defendant.

INSTRUCTION AS TO RELIANCE ON FALSE REPRESENTATIONS.

6. In an action for false representations in locating plaintiff on public land, an instruction, "If you find these representations were made, and that they were false, and that defendant knew them to be false, and that plaintiff relied on them, plaintiff would be entitled to recover," is not subject to the objection that it omits the element of belief of the representations on plaintiff's part, for reliance necessarily implies belief.

OPINION AS A FALSE REPRESENTATION.

7. Defendant was employed to select plaintiff a parcel of public land which he could locate as a homestead, and, in an action for false representations as to mineral claims on the parcel selected, the court instructed that "a statement or conversation which simply expressed the opinion of defendant as to whether or not there was a mining claim, or that it had been abandoned or forfeited, would not be a misrepresentation of a fact such as would entitle plaintiff to recover." *Held*, to be as favorable to defendant as he could reasonably expect.

From Douglas: JAMES W. HAMILTON, Judge.

Statement by MR. JUSTICE MOORE.

This is an action by A. L. David against William and Nicholas Moore to recover damages for alleged false and fraudulent representations. The complaint avers that on February 24, 1903, plaintiff entered into a contract with the defendants whereby, in consideration of \$125 and the payment of their expenses, they agreed to locate plaintiff upon a desirable quarter section of vacant public land, the title to which he could secure from the United States by complying with the requirements of the homestead law; that on the next day they represented to him that they had found a tract of such land, upon which there were no mining claims, and if any had ever been located thereon, they had been abandoned, and would not interfere with the filing of a homestead on the premises; that plaintiff knew nothing about locating government lands, or how to retrace the surveys or to find the corners thereof, but employed the defendants to perform such service for him and believed in and relied upon their statements

and representations in reference thereto, and that, induced thereby, he paid them the sum agreed upon, and their expenses of \$15, and thereupon filed a homestead on the land so selected, paying as government fees therefor the sum of \$22; that after making such entry plaintiff discovered on the land embraced in his homestead six valid and subsisting mining claims, of twenty acres each, which had been worked for their mineral deposits for many years, and that by reason thereof he was prevented from establishing his residence on the premises and from making his final proof; that at all the times mentioned the defendants had notice of the existence of the mineral locations, and knew they were situated on the land embraced in his homestead; and that their representations were false, and so known to be by them, and were intended to mislead and deceive the plaintiff, who, upon the discovery thereof, demanded the repayment of the money they had received from him, and of the damages he had sustained, but they refused to comply therewith. The answer denied the material allegations of the complaint, and, for a further defense, averred that defendants agreed to show plaintiff about one hundred and sixty acres of government lands, upon which he could file a homestead; that, in pursuance of such contract, they went with him and showed him a tract of public land of the kind desired, and he thereupon paid them the sum specified and entered the land; that at the time he secured his homestead right he also filed in the local land office his non-mineral affidavit, in which he deposed that he was well acquainted with the character of each legal subdivision of the land applied for, and that the same to his knowledge did not contain any valuable mineral deposit, and that no part of the land was claimed for mining purposes or worked for mineral during any part of the time; and that by reason of making such affidavit he is estopped to assert that he accepted the land upon defendants' representations. The reply put in issue the allegations of new matter in the answer, and, a trial being had, judgment was rendered against defendants for the sum of \$160, and they appeal.

AFFIRMED.

For appellant there was an oral argument by *Mr. Dexter Rice*, with a brief to this effect:

I. For the purpose of testing the complaint in cases like this, a rule analagous to that in actions for breach of covenant for quiet enjoyment is applicable, and the parties occupy the relation of vendor and purchaser (the locator the vendor, and the entryman the purchaser), subject to the duties and obligations imposed upon the entryman by the United States homestead law. The entryman cannot complain until after an actual ouster or surrender to one having paramount title: *Burt v. Dewey*, 40 N. Y. 283-286 (100 Am. Dec. 482); *Sweetman v. Prince*, 26 N. Y. 224-233; *Beach*, Contracts (ed. 1897), p. 359; *Sutherland*, Damages, p. 2575.

II. The statement that the previous location of the alleged mining claims prevents plaintiff from establishing his residence thereon is not a sufficient allegation of ouster or paramount title to support an action for breach of contract, the breach must be charged in unequivocal terms: *Beach*, Contracts, 2215; *Poier v. Gravel*, 88 Cal. 79.

III. The plaintiff and his agent were shown the ditch, the tunnel and the section corners, and they had every opportunity of ascertaining the facts. If they did not avail themselves of the means of knowledge at hand, plaintiff should not now be heard to say that he was deceived: *Slaughter's Admr. v. Gerson*, 80 U. S. (13 Wall.) 379, 383; *Farnsworth v. Duffner*, 142 U. S. 43 (12 Sup. Ct. 164); *Farrar v. Churchill*, 135 U. S. 609 (10 Sup. Ct. 771); *Wimer v. Smith*, 22 Or. 469, 479 (30 Pac. 416); *Kircher v. Conrad*, 9 Mont. 191 (18 Am. St. Rep. 731).

For respondent there was an oral argument by *Mr. J. A. Buchanan*, with a brief over the names of *Commodore S. Jackson*, *J. A. Buchanan* and *John T. Long*, to this effect.

1. Where the parties stand on an unequal footing, and the one making the representations is an expert in the matter in hand, or has means of knowledge not open to the other, such representations, if false, are fraudulent: *Clough v. Adams*, 71 Iowa, 17; *Fishback v. Miller*, 15 Nev. 428; *Schwenk v. Naylor*, 102 N. Y. 683; *Jackson v. Armstrong*, 50 Mich. 65; *Haygart v.*

Wearing, L. R. 12 Eq. 320; *Allen v. Millison*, 72 Ill. 201; *Eaton v. Winnie*, 20 Mich. 156 (4 Am. Rep. 377); *Mitchell v. Zimmerman*, 4 Tex. 75 (51 Am. Dec. 717); *Hanger v. Eirus*, 38 Ark. 334.

2. Positive proof of fraud is not required; it may be deduced from circumstances affording a strong presumption: *Elfelt v. Hinch*, 5 Or. 255; *Keel v. Levy*, 19 Or. 450 (25 Pac. 253); *McDaniel v. Baca*, 2 Cal. 326 (46 Am. Dec. 339); *Briscoe v. Bronaugh*, 1 Tex. 326 (46 Am. Dec. 108); *White v. Trotter*, 14 Smedes & M. 30 (53 Am. Dec. 112).

3. Misrepresentations of material matters recklessly made as of one's own knowledge, without in fact knowing whether they are true or not, renders the maker liable to one who relies and acts thereon to his injury: *Cawston v. Sturgis*, 29 Or. 331 (43 Pac. 656); *Munroe v. Pritchell*, 16 Ala. 785 (50 Am. Dec. 203); *Einstein v. Marshall*, 58 Ala. 153 (29 Am. Rep. 729); *Clark v. Dunham Lumber Co.* 86 Ala. 220; *Hanger v. Evins*, 38 Ark. 334; *Johnson v. St. Louis Butchers' Supply Co.* 60 Ark. 387; *Mayer v. Salazar*, 84 Cal. 646; *Sellar v. Clelland*, 2 Colo. 532; *Lahay v. City Nat. Bank*, 15 Colo. 339 (22 Am. St. Rep. 407); *Wheeler v. Baars*, 33 Fla. 696; *Bennett v. Terrell*, 20 Ga. 83; *Smith v. Dudley*, 69 Ga. 78; *United States v. Camp* (Idaho), 10 Pac. 227; *Case v. Ayers*, 65 Ill. 142; *Wightman v. Tucker*, 50 Ill. App. 75; *Frenzel v. Miller*, 37 Ind. 1 (10 Am. Rep. 62); *Krewson v. Cloud*, 45 Ind. 273; *Gregory v. Schoenell*, 55 Ind. 101; *West v. Wright*, 98 Ind. 335; *Furnas v. Friday*, 102 Ind. 129; *Prewett v. Trimble*, 92 Ky. 176 (36 Am. St. Rep. 586); *McAleer v. Horsey*, 35 Md. 439; *Lobdell v. Baker*, 1 Met. (Mass.) 193 (35 Am. Dec. 358); *Stone v. Denny*, 4 Met. (Mass.) 151; *Cheatham Furnace Co. v. Moffatt*, 147 Mass. 403 (9 Am. St. Rep. 727); *Fisher v. Mellen*, 103 Mass. 503; *Burns v. Dockray* (Mass.), 36 N. E. 551; *Beebe v. Knapp*, 28 Mich. 53; *Starkweather v. Benjamin*, 32 Mich. 305; *Halcom v. Noble* (Mich.), 37 N. W. 497; *Humphrey v. Merriam*, 32 Minn. 197; *Busterud v. Farrington*, 36 Minn. 320; *Haven v. Neal*, 43 Minn. 315; *Sims v. Eiland*, 57 Miss. 83; *Caldwell v. Henry*, 76 Mo. 254; *Hamlin v. Abell*, 120 Mo. 188 (25 S. W. 516); *Phillips v. Jones*,

12 Neb. 213; *Leavitt v. Sizer* (Neb.), 52 N. W. 832; *Bennett v. Judson*, 21 N. Y. 238; *Kountze v. Kennedy*, 147 N. Y. 124 (49 Am. St. Rep. 651, 29 L. R. A. 360); *Craig v. Ward*, 36 Barb. (N. Y.) 377; *Sharp v. New York*, 40 Barb. 256; *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; *Hexter v. Bast*, 125 Pa. 52 (11 Am. St. Rep. 874); *Griswold v. Gebbie*, 126 Pa. 353 (12 Am. St. Rep. 878); *Howard v. Gould*, 28 Vt. 523 (67 Am. Dec. 728); *Twitchell v. Bridge*, 42 Vt. 72; *Cabot v. Christie*, 42 Vt. 121 (1 Am. Rep. 313); *Bird v. Kleiner*, 41 Wis. 134; *Cotzhausen v. Simon*, 47 Wis. 103; *Montreal River Lumber Co. v. Mihills*, 80 Wis. 540; *Cameron v. Mount*, 86 Wis. 477 (22 L. R. A. 512); *Cooper v. Schlesenger*, 111 U. S. 147; *Lynch v. Mercantile Trust Co.* 18 Fed. 486; *Glaspie v. Keater*, 56 Fed. 203; *Nevada Bank v. Portland Nat. Bank*, 59 Fed. 338.

4. If a person makes a false representation under such circumstances that he ought to know whether it is true or false, knowledge of its falsity may be implied: *Wheeler v. Baars*, 33 Fla. 696; *Thorne v. Prentiss*, 83 Ill. 99; *Ruff v. Jarrett*, 94 Ill. 475; *Hubbard v. Weare*, 79 Iowa, 678; *Foard v. McComb*, 12 Bush (Ky.), 723; *Hexter v. Bast*, 125 Pa. 52 (11 Am. St. Rep. 874).

5. The covenant for quiet enjoyment is not broken until there has been a lawful eviction by paramount title. Such eviction need not, however, be by process of law. If a valid claim is made by a third person under a title paramount, the plaintiff may voluntarily yield up possession, assuming the burden of proving that the person entering had title paramount: *Sweetman v. Prince*, 26 N. Y. 233; *Greenvault v. Davis*, 4 Hill, 643; *St. John v. Palmer*, 5 Hill, 599; *Fowler v. Poling*, 6 Barb. 165; *Hamilton v. Cutts*, 4 Mass. 349 (3 Am. Dec. 222).

MR. JUSTICE MOORE delivered the opinion of the court.

It is contended by defendants' counsel that the court erred in overruling a demurrer to the complaint. It is argued that the plaintiff alleged he entered into a contract with the defendants whereby they were to locate him on a piece of government land, the title to which he could secure by making final proof in sup-

port of his entry; that the complaint shows that they kept their part of the agreement, but he refused to settle on the land, alleging his discovery of the mining claims thereon as an excuse for his failure to comply with the requirements of the homestead law; and that it does not follow that, because mining claims are located on government land, it is mineral in character to such an extent as to render it not open for settlement.

1. After the demurrer was overruled, defendants answered over, and, having done so, the only question to be considered is whether or not the complaint states facts sufficient to constitute a cause of action, which defect is never waived. See B. & C. Comp. § 72.

2. The complaint sets out the contract entered into by the parties, whereby defendants, in consideration of \$125, were to show plaintiff a piece of vacant public land, and that the land to which he was taken was not vacant, by reason of the mining claims thereon, and alleges such misrepresentations in respect to these claims as to excuse plaintiff from performing his part of the agreement: *Long Creek Build. Assoc. v. State Ins. Co.* 29 Or. 569 (46 Pac. 366); *Hannan v. Greenfield*, 36 Or. 97 (58 Pac. 888); *Durkee v. Carr*, 38 Or. 189 (63 Pac. 117).

3. It is further insisted that in an action of this kind a rule analogous to that controlling in actions for breach of covenant for quiet enjoyment is applicable, wherein the defendants, as locators, occupy the relation of vendors, and the plaintiff, as a homestead entryman, that of purchaser, subject to the paramount right of the United States, and to the duties and obligations imposed by the provisions of the acts of Congress in relation to the disposal of public lands, and that, invoking this principle, plaintiff is precluded from maintaining an action until after an actual ouster or a surrender to one having a paramount title, and the complaint, having failed to allege an expulsion or a relinquishment, did not state facts sufficient to constitute a cause of action, and hence the court erred in overruling the demurrer. The defendants are not vendors, in any sense of the term, nor do they represent the United States, the owner in fee of the premises, in the sale or disposal of its lands, but they are real estate

brokers, employed by plaintiff to secure for him public lands suitable for establishing his home thereon, and free from mining claims. If an action had been brought by them against him to secure the commission agreed upon, they could not have recovered the stipulated compensation unless they could have proved that the land pointed out to him corresponded with the terms of the contract. Because they have received the money they claim to have earned is no reason the sum should not be restored to him, if it was secured in consequence of their fraudulent representations. The complaint alleges that the money was obtained in this manner, and avers the relation existing between defendants and plaintiff, thereby stating facts sufficient to constitute a cause of action, and no error was committed in overruling the demurrer.

4. It is maintained by defendants' counsel that plaintiff's attention was called to a tunnel and to a ditch on the land to which he was taken; that the corners of the premises were pointed out to him, and, the means of knowledge as to the condition of the land being equal to each party, if he did not avail himself thereof he cannot now be heard to say that he was deceived by the alleged false representations. In *Slaughter's Admr. v. Gerson*, 80 U. S. (18 Wall.) 379 (20 L. Ed. 627), it was held that where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not take advantage of the means and opportunities thus afforded him he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations. In the case at bar the plaintiff visited the land which he sought to enter, in company with one of the defendants, who, as plaintiff testified, told him, in referring to a ditch they found thereon, that it had once been used for mining purposes, but that it had for a long time been abandoned, and that he made the same representations in respect to a tunnel which the plaintiff was then unable to say was within the boundaries of the land, but which he afterwards discovered was embraced in his homestead entry. The rule of caveat emptor applies only in cases where a party alleged to

have been deceived by the false representations of his adversary has full means of knowing the truth, and has acted in the transaction on his own judgment: *Wimer v. Smith*, 22 Or. 469 (30 Pac. 416); *Cawston v. Sturgis*, 29 Or. 331 (43 Pac. 656). This rule does not apply, however, to a case where the seller of real property makes representations in respect to matters of which the buyer has no knowledge, and no means at hand of obtaining knowledge: *Fishback v. Miller*, 15 Nev. 428; *Mitchell v. Zimmerman*, 4 Tex. 75 (51 Am. Dec. 717). Where one assumes to have knowledge of a subject of which another may be ignorant, and knowingly makes false representations regarding it, upon which the other relies to his injury, the party who makes such statements will not be heard to say that the person who took his word, and relied upon it, was guilty of such negligence as to be precluded from recovering compensation for injuries which were inflicted on him under cover of the falsehood: *Eaton v. Winnie*, 20 Mich. 156 (4 Am. Rep. 377). The plaintiff's testimony is to the effect that none of the mining claims located on the premises in question were being operated when he visited the premises, and that he was a recent immigrant to the State, and unacquainted with the working of auriferous placer or quartz mines. The means of knowledge in relation to the condition of the land were not equal to both parties, and plaintiff having testified that the defendant who showed him the premises told him that the ditch and tunnel they saw had long prior thereto been abandoned, thereby lulled the plaintiff to security; and the rule insisted upon is not applicable in such a case.

It is contended by defendants' counsel that the testimony fails to show that plaintiff relied or acted upon the representations of the defendants, or believed them to be true, and hence the court erred in refusing to grant a judgment of nonsuit. In *Anderson v. Adams*, 43 Or. 621 (74 Pac. 215), it is said: "To constitute a fraud by false representations, so as to entitle the plaintiff to relief, three things must concur: (1) There must be a knowingly false representation; (2) The plaintiff must have believed it to be true, relied thereon, and have been deceived thereby; and (3) that such representation was of matter relating

to the contract about which the representation was made, which, if true, would have been to plaintiff's advantage, but, being false, caused him damage and injury." No good purpose can be subserved in quoting from or commenting on the testimony given by plaintiff, which, in our opinion, fully sustains each of the elements stated in the rule quoted.

5. In support of the motion for a judgment of nonsuit, much stress is laid on plaintiff's nonmineral affidavit, the filing of which was a necessary prerequisite to the making of the homestead entry. The testimony given by him tends to show that he had no knowledge of mining or of mineral lands, and that, relying on the representations made to him by one of the defendants in relation to the abandonment of what was claimed to have been mere "prospecting," the affidavit in question was made. This written declaration under oath cannot prejudice plaintiff's right to recover the damages sustained, if he relied, for the information it contained, upon the representations so made to him, which fact it was the province of the jury to determine, and no error was committed in submitting that question to them.

6. It is maintained that the court erred in giving the following instruction, to which an exception was taken, to wit:

"(12) If you find that these representations were made, and that they were false, and that the defendants, or one of them, knew them to be false, and that the plaintiff relied upon them, then there would be another question for you to determine. The plaintiff would be entitled to recover some damages, and then it would be necessary for you to determine what damages the plaintiff should recover."

The objection to this part of the charge is that it omits the element of belief. A reliance upon the representation of a person in respect to any fact necessarily implies a belief in the truth of the statement thus made, for, unless such representation is believed to be true, no reliance is placed thereon. The word "relied," as used by the court in the language complained of, implies a belief, and this instruction is not subject to the objection interposed.

7. It is also claimed that the court erred in giving the following instruction, to which an exception was reserved, to wit:

"(15) The evidence in this case tends to show, gentlemen of the jury, that these parties had some kind of an agreement in regard to locating of the plaintiff on lands which he desired to settle upon and secure as a homestead, and tends to show that the defendant represented that he knew of a piece of land which plaintiff could settle upon, and that he took plaintiff out to this place and showed him the land, and while they were there it appears that there were some indications of mining having been carried on on the premises, and some conversation took place there about that. Now, a statement or conversation which simply expressed the opinion of the defendant in regard to the question as to whether or not there was a mining claim, or that it had been abandoned or forfeited, would not be a misrepresentation of a fact, such as would entitle the plaintiff to recover, if he simply gave a statement as to what he deemed the law in regard to that matter."

None of the testimony given by the defendants or their witnesses is incorporated in the bill of exceptions, in the absence of which it must be presumed that the part of the charge under consideration was applicable to their theory of the action. It is reasonably inferable from this instruction that the defendants may have concluded, because the right to the mining claims was not properly initiated, that the necessary development work had not been performed, or that the operation of the mines had been discontinued for such a length of time as to render them invalid, and that the representations in relation thereto were not statements of what purported to be facts involved, but amounted to an opinion concerning the law applicable thereto. In any view of the case, however, we are of the opinion that the parts of the charge to which exceptions were saved are as favorable to the defendants as they had a right to ask or could reasonably expect.

Believing, as we do, that plaintiff was ignorant of the kind of property which he inspected, that he relied on defendants' representations in respect to the abandonment of the mining claims, and was deceived thereby to his injury, and that this cause was fairly tried, the judgment is affirmed.

AFFIRMED.

Argued 19 January, decided 13 February, 1905.

OREGON *v.* SIMMONS.

79 Pac. 498.

ESCHEAT—NEED OF TERMINATION OF ADMINISTRATION.

Under B. & C. Comp. §§ 5577, subd. 7, 5578, subd. 5, and 5614, defining the conditions under which property escheats to the State, and Section 5616, providing for the commencement of escheat actions by the law officer of the State, such actions must be subordinate to the probate proceedings in the county court, and before a judgment of possession can be entered in an escheat case it must appear that the estate has been finally settled.

From Multnomah: ALFRED F. SEARS, JR., MELVIN C. GEORGE and JOHN B. CLELAND, Judges, in joint session.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is an escheat proceeding by the State of Oregon against S. W. Simmons, as administrator, and the heirs of Henry Wilson, deceased. The information filed herein November 24, 1899, shows, in substance, that Henry Wilson died in Multnomah County, April 27, 1899, intestate and without heirs; that he left an estate situate therein consisting of real and personal property which is particularly described; that the defendant Simmons was, on May 24, 1899, duly appointed, and still continues to be, the administrator of said estate; that Henry Wilson was in his lifetime, and since his death his estate has been, seized of the real and personal property described, and that the administrator is now in possession and occupancy of the whole thereof; that there are no unpaid claims against the estate; that "after paying all lawful demands and claims, including costs and expenses of administration," the administrator has in his hands the property so designated; and that the same belongs to the State of Oregon; concluding with a prayer that the property be sold in the manner prescribed by law, and the proceeds accounted for to the State. The answer of the administrator admits all these averments except such as relate to heirship, claims and demands against the estate, and the costs and expenses of administration, which are denied, and affirmatively shows that at the time of the filing of the information, and at the present time, there were and are lawful claims against the estate which have been duly allowed, but remain unpaid. This affirmative showing was, however, stricken out on motion, and

upon the issues remaining a trial was had before the court without the intervention of a jury. Findings of fact and law were made, and judgment rendered thereon, whereby the administrator was directed and required to deliver the property in question to the Sheriff of Multnomah County, to be sold as by law required, from which judgment he appeals. The findings of fact contain none relative to the payment of the claims and demands against the estate, or the costs and expenses of administration, nor does it appear that the estate has been fully administered or settled.

REVERSED.

For appellant there was a brief over the names of *Hayward H. Riddell* and *Jay H. Upton*, with an oral argument by *Mr. Riddell*.

For respondent there was a brief over the names of *Andrew M. Crawford*, Attorney General, and *John Manning*, District Attorney, with an oral argument by *Mr. Crawford*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

Before the State could have judgment against the administrator that he render possession of the property involved by the controversy to the sheriff, it is essential that it allege and show that all the claims and demands against the estate presented to the administrator in the usual course, and all costs and expenses of administration have been fully paid and discharged, and the estate settled; otherwise the administrator is still entitled to retain the property for the purpose of administration. Such, in effect, is the holding of this court in *State ex rel. v. O'Day*, 41 Or. 495 (69 Pac. 542). The complaint shows that the administrator is in possession of the property, that there are no unpaid claims against the estate, and by reasonable inference, which we are allowed to draw after answer, that all lawful claims and demands against the estate, including the expenses and costs of administration, have been paid; but the trial court has made no finding touching these important and essential allegations, nor has it found that the estate has been fully settled, so that the findings do not support the judgment rendered. There cannot be two repugnant jurisdictions of the

same matter at the same time, and while the county court has jurisdiction to administer the estate the circuit court cannot have jurisdiction to take it from the administrator and turn it over to the sheriff. The latter jurisdiction must necessarily abide the exercise of the former until the business thereof has been fully settled, which is to administer and settle the estate. When this is done, the latter may exercise jurisdiction and adjudge that the residue be delivered up to the sheriff, but until then any judgment entered in the circuit court against the administrator for the present possession of the property is premature and without the sanction of law. At the time of the commencement of this action and the rendition of the judgment by the circuit court, the statute (B. & C. Comp. § 5616) provided that, when the Governor was informed or had reason to believe that any real or personal property had escheated to the State, he should direct the district attorney to file an information setting forth the necessary facts to have it so declared, which was to be followed by other proceedings until the contemplated adjudication was had. Property escheats to the State when the decedent leaves no lawful descendants, kindred, or other persons competent to take under the statute: B. & C. Comp. §§ 5577, subd. 7; 5578, subd. 5; and 5614. Such property is, however, subject to the debts and liabilities of the estate of the decedent and the costs and expenses of administration, and, before these can be ascertained and regularly discharged, there must be an administration, and of this, as we have seen, the county court has exclusive jurisdiction. The statute, however, is susceptible of the construction that escheat proceedings could have been begun at once, whenever the governor was informed that the property had escheated; but such proceedings, when commenced, must necessarily bide the time of the settlement of the estate in the county court, before judgment can be had against the administrator that he render possession of the property to the sheriff. Any other rule would lead to conflict of jurisdiction and confusion, and such was manifestly not the intention or purpose of the legislature. A statute of more recent date has been adopted (Laws 1903, p. 127), purporting

to oust the jurisdiction of county courts to determine the question of heirship or right to claim personal property of an estate after information of escheat has been preferred, but it does not assume to curtail its original jurisdiction as to the settlement of the claims and demands against the estate, and the costs and expenses of administration, so that the amendment cannot affect the present controversy. Section 9 of the latter act prescribes that the judgment escheating personal property shall provide that any such property remaining undisposed of by order of the probate court shall be sold by the sheriff, etc., and it is suggested by the attorney general that this court is thus empowered to modify the judgment in the present proceeding accordingly, and thereby avoid the necessity of remanding the cause. To do this, however, we must know by some finding of fact of the trial court that there would be some part of the decedent's estate left after full administration in the probate court; otherwise it would be useless to enter any judgment in the premises. We are impressed, therefore, that a regular procedure requires a reversal of the present judgment against the administrator, and that the cause should be remanded for such further action in the premises as may seem proper, and such will be the order of this court.

REVERSED.

Decided 9 January, 1905, rehearing denied.

MANCHESTER ASSUR. CO. v. OREGON RAILROAD CO.

79 Pac. 60, 69 L. R. A. 475.

MEMORANDUM AS EVIDENCE UNDER OREGON STATUTE.

1. The old rule as to the use by witnesses of memoranda made by themselves or others has been so modified by Section 848, B. & C. Comp., that the memorandum can be used only when it was made by the witness or under his direction. If the memorandum was made by another and not under the direction of the witness, it cannot be referred to, even though the witness saw it soon after it was made, and then knew of his own knowledge that it conformed to the facts.

MEMORANDA—NATURE OF EVIDENCE—REFRESHING MEMORY.*

2. Memoranda are but secondary evidence, and not competent if the witness is able to testify without referring to them, or if he is able to testify from recollection after refreshing his memory by inspecting them.

BUSINESS AND PRIVATE MEMORANDA COMPARED.

3. The admissibility of business and private memoranda is not controlled by quite the same rule, the practice being rather more liberal in reference to the former.

*NOTE.—See the case of *Curtis v. Bradley*, 48 Am. St. Rep. 177, 28 L. R. A. 143.

ADMISSIBILITY OF MEMORANDA MADE BY CLERKS.

4. Where locomotive inspectors enter the results of their regular inspections on slips which are filed in a designated office, where the information is, under the regulations of the office, copied by a clerk into a book which the inspectors subsequently sign after comparing the copy with the original data, it is error to permit an inspector to refresh his memory from the book without producing the original entries, or accounting for their absence.

IDEM.

5. Where original memoranda of locomotive inspections are shown to be lost, other memoranda made from the original slips by a clerk in accordance with his duties, and shown by the evidence of the clerk and inspectors to be correct, are admissible.

FIRES BY ENGINES—EVIDENCE OF OTHER FIRES.

6. In an action for damages resulting from a fire set by a passing locomotive, where plaintiff did not identify the particular engine that caused the fire, the jury may consider evidence as to other fires about that time caused by engines of the defendant, and as to the scattering of live coals about the time in question by such engines.

From Umatilla: WILLIAM R. ELLIS, Judge.

Action by the Manchester Assurance Co. and another against the Oregon Railroad & Navigation Co., resulting in a verdict for defendant.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. John J. Balleray* and *Mr. John McCourt*.

For respondent there was a brief over the names of *William W. Cotton*, *Carter & Raley* and *Henry F. Conner*, with an oral argument by *Mr. Conner*.

MR. JUSTICE WOLVERTON delivered the opinion.

The plaintiffs seek to recover damages for loss by fire alleged to have been occasioned by the negligence of the defendant, its agents and employees. The verdict and judgment of the circuit court were for defendant, and plaintiffs appeal.

The defendant, to show that it had observed proper care and precaution in keeping its engines and the smokestacks thereof in suitable repair to prevent the escape of sparks and fire, and the consequent injury to the property of others along the line of its railroad, called one Whitby as a witness, who testified that his occupation was that of a boilermaker; that he was and had been in the employ of the defendant; that he inspected locomotives at times, but that he could not testify from memory regarding any inspection of engine No. 400—the one supposed to have done the damage. A book was then placed in his hands, and

his attention called to a page purporting to show the examination, condition, and repair of the smokestack and ash pan of such engine at La Grande from time to time during the month of December, 1902. This book is ruled in columns headed, respectively: "Date of Examination"; "Condition of Smokestack and Netting"; "Repaired, State Nature of Repairs"; "Condition of Ash Pan and Netting"; "Repairs, State Nature of Repairs"; "Signature of Inspector"; and "Occupation." Within the column headed "Condition of Smokestack and Netting" is written the word "Good," opposite the figure "2" in the column headed "Date of Examination." The word "Good" is also written under the heading "Condition of Ash Pan and Netting," the name of C. W. Ellsworth under the heading "Signature of Inspector," and the word "Inspector" under that of "Occupation." The same thing appears as of dates December 3d and 5th. So of the 7th, 11th, 13th, 15th, 23d, 30th, and 31st, except that the name of J. A. Whitby appears under "Signature of Inspector," and "Boilermaker" under "Occupation." The witness then further testified that the signatures on the page were those of the witness, except the first three, and that the word "Boilermaker" was written by him, but that the word "Good," wherever appearing, was written by a clerk in the division foreman's office; that it was entered from reports that the witness turned in in writing; that when he signed the page he knew the entries as indicated by the clerk opposite his signature to be correct.

On cross-examination the inquiry proceeded as follows:

"Q. Do you know those entries there to correctly report the examinations made on those dates?

A. They do.

Q. What do you recall about the inspections except from this memoranda?

A. When the book is given to me to sign, we have the memoranda right there, and look them over when we sign the book, to make sure it is right when we sign it.

Q. You make these memoranda on what—a book?

A. Yes, sir; a shopbook. * *

Q. The book is still there, which you made the original entries in?

A. I guess it is.

Q. It is not here, is it?

A. No, sir.

Q. The clerk makes this, and you sign them?

A. He keeps them, and copies them off of these reports.

Q. Who told you he copied it off?

A. I frequently see him."

It is further shown that this book is signed by the inspector from the 1st to the 5th of every month following. The page alluded to had previously been offered and received in evidence without objection while Ellsworth, the inspector, signing as of dates December 2d, 3d, and 5th, was on the stand, and likewise the entire book had been offered and admitted, which shows the inspection of many other engines during the same month; but at this time there was an objection interposed both to the memorandum, and to the witness using it, because it appears from the witness's statement that he did not make the entries, nor were they made under his supervision. Ellsworth, while a witness, testified that he made his reports sometimes on stubs, requisition stubbooks—anything to get them on—during the month, which he sent into the office, but that he had them before him when he signed up the exhibit. The objection to the memorandum itself is manifestly without merit, as at this time it had already been admitted in evidence without objection; and, as to the objection to the witness using it, we are of the opinion that it is also without merit, for the reason that the exhibit was already a matter in evidence, and, being so, there existed no good reason why the witness should not have been examined concerning it, nor why he should not have made such statements touching the real facts as he was enabled to with its aid. However, as this case must go back for a new trial on another point, we will state briefly the result of our investigation as to the admissibility and use of this memorandum for any purpose in the case.

1. Under the testimony of Whitby, the result of the inspections were first noted in a shopbook, and the memorandum in question was subsequently made up from these notations by the division foreman's clerk, and verified by the witness, who appended his signature in testimony thereof. The original entries are those made in the shopbook. Memoranda made up therefrom are but secondary evidence, and are not per se competent evidence of

what was done; nor are they competent for use by the witness under any conditions unless they so refresh his memory that he would thereby be enabled to testify independently of them, or except the originals be lost, or their absence legally excused: *State v. Magers*, 36 Or. 38, 42 (58 Pac. 892); *Haines v. Cadwell*, 40 Or. 229 (66 Pac. 910). By the old law a witness might have refreshed his memory from the memorandum or writing made by himself or under his direction, if made at or near the time, and while the fact or facts of which it speaks were fresh in his mind; and so he might have refreshed his memory from a memorandum or record made by another, if read by or to him when the matter was fresh in his memory, so that he was enabled to depose that the writing correctly represented his recollection at the time: 1 Greenleaf, Evidence (16 ed.), § 439b; Abbott, Trial Brief (2 ed.), 395; Stephens, Evidence, Art. 136; 2 Phillips, Evidence, *916; *Commonwealth v. Ford*, 130 Mass. 64 (39 Am. Rep. 426). The statute has changed this rule, so that now a memorandum must have been made by the witness himself, or under his direction: B. & C. Comp. § 848. This statute, in the light of the law as it formerly stood, was probably designed to apply more particularly, if not exclusively, to those memoranda where, after consultation by the witness, his memory is not so refreshed that he can speak from his own recollection independently of the writing, because, if wholly refreshed, so that he can speak without it, it is not always necessary that he produce it in court; but, if reference is made to it while testifying, it is proper for the opposite counsel to cross-examine concerning it, to determine whether he is using it as evidence aside from his recollection: *Friendly v. Lee*, 20 Or. 202 (25 Pac. 396); *State v. Magers*, 36 Or. 38, 42 (58 Pac. 892); *Haines v. Cadwell*, 40 Or. 229 (66 Pac. 910); *Hill v. State*, 17 Wis. 675 (86 Am. Dec. 736); *Folsom v. Apple River L. Co.* 41 Wis. 602.

2. The theory of the law deducible from the books seems to be that a memorandum is but secondary evidence of the facts of which it speaks, the primary evidence being the knowledge of the witness, if he is able to testify truly as to the facts mentioned, or if he is enabled to testify from present recollection

after having had his mind quickened by the memorandum—that is to say, of his own knowledge, independent of the memorandum; and it is only when this primary proof is not available that resort may be had to the secondary, so that it becomes necessary to show that the witness cannot speak from knowledge of the facts, or from present recollection thereof, after having consulted the memorandum, before it can become of evidentiary value, either as auxiliary, or an aid to the mind in speaking from it: *Bradner*, *Evidence* (2 ed.), 472; *Abbott*, *Trial Ev.* (2 ed.), 395, 396; *Friendly v. Lee*, 20 Or. 202 (25 Pac. 396); *Howard v. McDonough*, 77 N. Y. 592; *Peck v. Valentine*, 94 N. Y. 569, 571; *National Ulster County Bank v. Madden*, 114 N. Y. 280, 284 (21 N. E. 408, 11 Am. St. Rep. 633); *Krom v. Levy*, 1 Hun (N. Y.), 171; *People v. McLaughlin*, 150 N. Y. 365 (44 N. E. 1017); *Acklen's Executor v. Hickman*, 63 Ala. 494 (35 Am. Rep. 54); *Huyden v. Hozie*, 27 Ill. App. 533. But to enable a witness to testify from the memorandum, under the conditions stated, it must be the original, unless it be lost, or its absence excused: *Davis v. Field*, 56 Vt. 426; *Caldwell v. Bowen*, 80 Mich. 382 (45 N. W. 185); *Harrison v. Middleton*, 11 Grat. 527, 547.

3. If the original be produced, and it appears that it was made in the usual course of business, it may be introduced and received in evidence along with the testimony of the witness who made it, and is enabled to say that the facts stated in it were correctly minuted at the time; but this is because he has forgotten, so that he is unable to speak concerning such facts without the aid of the memorandum: *Abbott*, *Trial Ev.* (2 ed.), 395; *National Ulster County Bank v. Madden*, 114 N. Y. 280, 284 (11 Am. St. Rep. 633, 21 N. E. 408); *Peck v. Valentine*, 94 N. Y. 569, 571; *Krom v. Levy*, 1 Hun (N. Y.), 171; *Merrill v. Ithaca & Owego R. Co.* 16 Wend. 586 (30 Am. Dec. 130); *Moots v. State*, 21 Ohio St. 653; *Burton v. Plummer*, 2 A. & E. *341; *Doe v. Perkins*, 3 D. & E. 749; *Tanner v. Taylor*, referred to by Mr. Justice BULLER in the latter case. Memoranda made in the usual course of business, when made up from reports of subordinates, are admissible, under the rule, when accompanied by the

testimony of such subordinates that they represent truly what had transpired, combined with that of the person minuting the transactions that they were also truly noted; but not so with merely private memoranda, not made in pursuance of any duty owed by the person making them: *Mayor v. Second Ave. R. Co.* 102 N. Y. 581 (7 N. E. 905, 55 Am. Rep. 839). To the same purpose, see *Harwood v. Mulry*, 8 Gray, 250; *Miller v. Shay*, 145 Mass. 162 (16 N. E. 468, 1 Am. St. Rep. 449). So, the court in the case of *The Norma*, 68 Fed. 509 (15 C. C. A. 553), where entries were made in the usual way from memoranda furnished by foremen of the time of their workmen, the memoranda being lost, held that the proofs were sufficient as to certain items pertaining to the yacht; the foremen having been called in conjunction with the bookkeeper who made up the account, citing *Mayor v. Second Ave. R. Co.* 102 N. Y. 581 (7 N. E. 905, 55 Am. Rep. 839). Another phase of the question was presented in *Peck v. Valentine*, 94 N. Y. 569, where the plaintiff, for the purpose of proving that defendant had not entered in his cashbook all the moneys received by him for the sales of lumber, called one Leggett, who testified that he kept on a loose piece of paper an account of moneys received by defendant, which he gave to the plaintiff. This the plaintiff supplemented by his own testimony that he received the memorandum from Leggett and had lost it, but that he had correctly copied the figures into a memorandum book, and that the entries had not been altered; and it was held error to receive the book in evidence, because the memorandum of Leggett was not produced, and he was not called upon to verify its contents. Of a kindred nature is *Hematite Min. Co. v. East Tennessee, V. & G. R. Co.* 92 Ga. 268 (18 S. E. 24).

4. In the light of these rules and legal principles, we are of the opinion that the original memoranda of Ellsworth and Whitby, showing the dates of their inspections, should have been produced, if they were unable to testify to the facts thereby recorded without and independently of them. If produced, however, it would have been competent to submit them to the jury, as well as for the witnesses to speak from them.

5. If, on the other hand, they have been lost, and the fact is satisfactorily shown, then the fact of the inspection could be proven by calling the inspectors in conjunction with the clerk in the division foreman's office who made up the present book in the usual course of business, and the book would then become competent evidence to go to the jury. Neither the inspector nor the clerk being able to testify as to the fact of the inspection and the result, with the attendant dates, from present recollection, the necessity for resort to the secondary evidence would thus be shown; otherwise the book could not be introduced. The book is not a memorandum made by the inspectors or under their direction, but it is a reproduction of the original memoranda made by them. It is a memorandum made by the clerk, however, and, when his testimony concerning it is conjoined with that of the inspectors, showing that inspections were made, and that their memoranda have been lost, or that their production is excusable, and they are able at the same time to verify this as being a correct transcript therefrom, there exists no good reason why the book should not go to the jury.

6. According to the bill of exceptions, the plaintiffs introduced evidence tending to prove that the fire occurred on the 3d day of December, 1902; that it started in a warehouse close to the railroad; that a passenger train passed, and that about fifteen minutes afterwards the fire was discovered; that when first seen it was a "little fire—looked like a headlight of an engine at a short distance"; and that it started on the roof of a warehouse. This was about six o'clock in the morning. Plaintiffs also introduced other evidence tending to show that other trains were seen passing there on previous mornings, and shortly after the fire, and that the engines were frequently seen to throw out sparks sufficient at times to set fire to grass along the way; that the engine hauling the same passenger train was at other times seen to emit sparks, some of them of large size; that the passenger train in question was No. 6, but it was not known what engine was attached to it. Under this record, plaintiffs requested the following instruction:

"You are the judges of all the facts in the case, and should the defendant offer proof to establish the fact that the engines

and the particular engine claimed to have caused the fire was equipped with the best modern appliances generally used, and that it was in good repair, and operated by careful and skilled mechanics, who were careful at the time, you will nevertheless take all the evidence into consideration, and determine from the whole evidence whether this is true or not; and, in doing this, you will take into consideration any evidence tending to show that other fires were caused by engines of the defendant at other times shortly prior or subsequent to the fire alleged in the complaint, or whether engines of the defendant, or this particular engine, scattered coals or sparks or cinders at the time of this particular fire, or shortly prior or subsequent thereto, in determining whether the defendant has been guilty of negligence or not."

This the court modified so as to confine its application to the particular engine which it is claimed caused the fire, and its action in that regard is assigned as error. The particular engine that did the damage not having been identified by plaintiffs' pleadings or proof, plaintiffs were entitled to the instruction requested: 2 Thompson, Negligence, 2371, 2372, 2373, 2374; *Koontz v. Oregon Ry. & Nav. Co.* 20 Or. 3 (23 Pac. 820). The one given had the effect of saying to the jury at the last that, although evidence had been admitted tending to show that other engines than the one claimed by the defendant to have set the fire had shortly previous, and subsequent thereto, in passing in proximity to the place, scattered and communicated the fire, they need not consider such evidence, but only such of the kind as related to the particular engine in question, in arriving at their verdict in the case. This was error, for which the judgment of the circuit court will be reversed, and the cause remanded for such further proceedings as may seem proper.

REVERSED.

Argued 5 January, decided 6 February, 1905.

SENGSTACKEN v. McCORMAC.

79 Pac. 412.

TIDE LAND—NATURE OF GROUND.

1. A strip of sandy soil varying from ten inches to ten feet in width and a mile long lying at the foot of a steep bank, and about half the time entirely submerged, though at other times uncovered at ebb tide, is not tide or overflowed land.

ESTOPPEL BY RECITALS IN DEEDS.

2. A claimant of the right to approach and use deep water fronting his upland is not estopped to dispute the character of certain land claimed to be tide land, and which he must cross, by a reference thereto as such in some of his title deeds, where it is apparent that such reference was not intended as an admission or statement as to the character of the land, but was added as a matter of precaution.

From Coos: JAMES W. HAMILTON, Judge.

Suit by Henry Sengstacken against James T. McCormac for an injunction, which was unsuccessful. **AFFIRMED.**

For appellant there was an oral argument by *Mr. Martin L. Pipes* and *Mr. Ephraim B. Seabrook*, with a brief over the names of *M. L. Pipes* and *McKnight & Seabrook*, to this effect.

The tide lands actually exist: *Andrus v. Knott*, 12 Or. 501 (8 Pac. 763); *Storer v. Freeman*, 6 Mass. 435, 439 (4 Am. Dec. 155); *Doane v. Willcutt*, 71 Mass. (5 Gray) 328, 335 (66 Am. Dec. 369); *Niles v. Patch*, 79 Mass. (13 Gray) 257; *Hathaway v. Wilson*, 123 Mass. 361; *Church v. Meeker*, 34 Conn. 424; *Bell v. Gough*, 23 N. J. Law, 683; *People v. Morrill*, 26 Cal. 354; *Galveston v. Menard*, 23 Tex. 358; *Cults v. Hussey*, 13 Me. 241; *United States v. Pacheco*, 69 U. S. (2 Wall.) 587; 22 Am. & Eng. Enc. Law (1 ed.), 778.

For respondent there was an oral argument by *Mr. Edward B. Watson* and *Mr. John F. Hall*, with a brief over the names of *Hall & Hall* and *E. B. Watson*, to this effect.

"Tide lands," within the meaning of the several acts of the legislature of this State providing for their disposal, are such lands only as are covered and uncovered daily by the rise and fall of the ordinary tides: Act of October 28, 1872 (Deady & Lane Code, pp. 664-66); Act of October 26, 1874 (Laws 1874, p. 76); Act of October 21, 1876 (Laws 1876, pp. 69, 70); *Hinman v. Warren*, 6 Or. 408, 411; *Andrus v. Knott*, 12 Or. 501, 503 (8 Pac. 763); *Johnson v. Knott*, 13 Or. 308, 311 (10

Pac. 418); *Elliot v. Stewart*, 15 Or. 259, 262 (14 Pac. 416); *Lewis v. City of Portland*, 25 Or. 133, 162 (22 L. R. A. 736, 42 Am. St. Rep. 772, 35 Pac. 256); *People v. Davidson*, 30 Cal. 379, 389; *Storer v. Freeman*, 6 Mass. 435, 439 (4 Am. Dec. 155); *Doane v. Willcutt*, 71 Mass. (5 Gray) 328, 335 (66 Am. Dec. 369).

MR. JUSTICE BEAN delivered the opinion of the court.

This is a suit to enjoin the construction and maintenance of a boom in the Coquille River in front of lots 7 and 8, section 7, and lots 4 and 5 in section 3, township 28 south, range 13 west, in Coos County. The defendant owns or has license to occupy the water front, and permission from the United States government to construct and operate the boom. The plaintiff claims to be the owner, as the successor in interest of the grantees of the State, of a narrow strip of tide land, alleged to be from one to fifteen feet wide, and about a mile long, lying between the upland and the river, and that the proposed boom will interfere with the ingress to and egress from such tide land. The defendant denies the existence of the alleged tide land. Upon the testimony the court below found that the strip of land in controversy "varies in width, at some places not exceeding three inches in width, at others the bank is perpendicular, and its greatest width in any place does not exceed sixteen feet," and that it was not tide land, and therefore dismissed the complaint.

1. Several questions were presented at the argument, but, as we are in accord with the trial court upon the facts, it is unnecessary to consider them. There is no substantial controversy in the testimony, and no useful purpose can be served by referring to it in detail. It is sufficient to state merely our conclusions derived from an inspection of the record. The land in controversy is situated a short distance below the City of Coquille, and about thirty miles from the mouth of the river. At this point during the summer months there is a tidal rise and fall of about three feet, which daily covers and uncovers a narrow strip of land, varying in width from a few inches to perhaps ten or twelve feet in places, between the foot of the bank and low water. During five or six months in the winter this land is

entirely submerged. No part of it is daily covered and uncovered by the ebb and flow of the tide during the whole year. The bank of the river is steep and even perpendicular in some places, and of a sandy soil. The wash of the water caused by the winds, tides, and passing steamers has a constant tendency to undermine the bank and cause it to cave in and to cast sediment and silt up against the shore, thus forming a narrow strip of earth, which is at times exposed at low water, but which has no real permanent situs, but is shifted and changed more or less from time to time by the action of the water. Under these facts, the case is, in our opinion, ruled by the decision of this court in *Andrus v. Knott*, 12 Or. 501 (8 Pac. 763), and the doctrine there announced is controlling here.

2. A contention is made that the defendant is estopped to deny that the land is in fact tide land because some of the deeds in his chain of title refer to the grantor's right and interest in or to the tide land lying in front of the upland. The defendant does not hold or claim title as a grantee of the State. His title or right is based upon the ownership of the upland, and the reference to tide land in some of the deeds in the chain of title was evidently intended as a mere matter of precaution, and not as an admission or statement that there was in fact any tide land. Without further discussion of the testimony or of the law, we are agreed that, under the facts, the land claimed by the plaintiff is not tide or overflowed land, within the meaning of the law authorizing the sale and disposition of such land.

The decree of the court below is affirmed.

AFFIRMED.

Argued 11 January, decided 13 February, 1905.

GROVES v. OSBURN.

79 Pac. 500.

EFFECT OF DISCHARGE IN BANKRUPTCY ON RIGHT OF CREDITOR THEREAFTER TO EQUITABLY ENFORCE CLAIM AGAINST HOMESTEAD.

After a debtor has been discharged in bankruptcy, a debt cannot be enforced in equity by a proceeding in rem against the homestead set apart in the proceedings to the bankrupt, though the debt was contracted prior to the adoption of the state homestead exemption act (B. & C. Comp. § 221), which applies only to the enforcement of a judgment obtained on liabilities thereafter contracted, and though a judgment so obtained might have been enforced against such homestead before the debtor's discharge in bankruptcy.

From Benton: JAMES W. HAMILTON, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is a suit by Emma K. Groves, as executrix of the estate of William Groves, deceased, against John M. Osburn. The defendant was adjudged a bankrupt November 23, 1900, and was discharged of his debts by order of the federal court May 29, 1901. His homestead, consisting of lots 1, 2, 8, and 12 in block 3 in the County Addition to the City of Corvallis, was set apart to him in the course of the bankruptcy proceedings, and the estate was fully settled and the trustee discharged in 1902. The purpose of the present suit, instituted March 23, 1903, is to subject the homestead to the payment of four certain promissory notes executed by the bankrupt on and prior to June 2, 1891. These notes were provable and proved as claims against the bankrupt's estate, but only a small dividend was paid thereon out of the assets. The circuit court dismissed the suit, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. W. S. McFadden* and *Mr. E. E. Wilson*.

For respondent there was a brief over the name of *Yates & Yates*, with an oral argument by *Mr. W. E. Yates*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The sole question involved is whether a court of equity has jurisdiction of the cause, since the bankrupt has been discharged of the debts upon which the suit is founded. The homestead exemption act within this State was adopted in 1893, and the exemption is against all liabilities thereafter contracted, or the enforcement of any judgment obtained upon such liabilities: B. & C. Comp. § 221. The indebtedness upon which this suit is premised is therefore unaffected by the act, and but for the proceedings in bankruptcy the plaintiff would have a clear right of action, not of suit, thereon, and the judgment obtained could have been enforced against the property. The strong contention of counsel for the plaintiff is that because the defendant has been discharged of his provable debts, of which character are the demands in suit, she has no adequate remedy at law,

and therefore that a suit will lie as a proceeding in rem—not against the person—to subject the property to the payment of such demands. This must, we think, depend entirely upon the question whether the plaintiff has an equitable lien upon the homestead, for it cannot be that the one circumstance that the plaintiff has been deprived of her right of action to proceed to judgment upon the indebtedness will alone confer jurisdiction upon a court of equity to entertain a suit thereon. This view is practically conceded by the very position sought to be maintained, namely, that the suit is not personal in character, but solely in rem. In so far as it respects the homestead exemption under the state law, the jurisdiction of the court of bankruptcy extends merely to a determination of its character as such, and when so determined it is required to set the property aside to the use of the bankrupt unless it might retain jurisdiction in exceptional cases, of which it is not now necessary to inquire: 5 Cyc. 359; *Lockwood v. Exchange Bank*, 190 U. S. 294 (23 Sup. Ct. 751, 47 L. Ed. 1061); *In re Hatch*, 102 Fed. 280 (4 Am. Bankr. Rep. 349); *In re Ogilvie*, 5 Am. Bankr. Rep. 374; *In re Jackson* (D. C.), 116 Fed. 46; *Ingram v. Wilson*, 125 Fed. 913 (60 C. C. A. 618). So that, when the property in question was set apart to the bankrupt as exempt, the jurisdiction of the federal court over it was at an end.

It is insisted that the lien exists by analogy to the doctrine under the old law that where a contract was made with a married woman upon the faith of her separate estate, there being no right of action against her because she was a feme covert, a suit in equity was entertained to subject her property to the payment of the liability thus incurred. The rationale of the doctrine alluded to is concisely stated by Mr. Pomeroy: "The liability of a wife's separate property to her engagements is a mere equitable incident of her separate estate, which is itself a creature of equity." In further elucidation the learned author quotes from Lord COTTENHAM as follows: "The separate property of a married woman being a creature of equity, it follows that if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to

be paid out of it; and, inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied": 3 Pomeroy, Eq. § 1122. The logic of the situation was not that the wife's contracts created specific charges upon her separate estate, but that for the enforcement of such contracts equity afforded recourse to such property, which was in itself an equitable estate. Of course, there was the idea and condition that the claimant had no adequate remedy at law, but, unlike the case at bar, no such remedy ever did exist, and the jurisdiction of equity attached from the very inception of the claim. The analogy which counsel seek to draw is not apparent, nor does it suggest any legal principle by which a lien of any character upon the exempt homestead may be predicated in favor of these creditors. Nor is the principle that the vendor may in some jurisdictions have a lien for the purchase money (*Smith v. Gowdy's Admr.* 3 Ky. Law Rep. 538) adequate to impress a lien in the present case, because no such relation exists.

Another principle upon which it is urged that a lien exists against the homestead for these demands is that they stand in the like relation as if the defendant had, as he might do in Georgia, especially waived his exemption when the debts were contracted. In that State, however, the special provisions of the statute touching waiver impart to it the character of a security for the payment of the debts or obligations in favor of which it is made, and the equitable jurisdiction is enlarged so that a receiver may be appointed to take possession of, and hold subject to the order of the court, any assets charged with the payment of debts, by reason whereof, coupled with the fact that the creditor has no remedy at law against the bankrupt, it has been held that he has a remedy in equity to subject the exempt property to the payment of his demands: *Bell v. Dawson Grocery Co.* 120 Ga. 628 (12 Am. Bankr. Rep. 159, 48 S. E. 150). But for the statutory provisions alluded to, however, it is manifest from a reading of the case that equitable jurisdiction

would not have been entertained. We have no such regulations in this State. It will be noted, also, that the cause was instituted and the property taken into the custody of the law before there was any discharge of the bankrupt from his debts or liabilities, for the court says: "Doubtless the bankrupt court will defer the discharge of the bankrupt, in accordance with the ruling in the Lockwood Case (190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061), until the creditor can have an opportunity to obtain a judgment against the exempted property." The doctrine promulgated in Georgia is therefore not of general application, and is insufficient upon which to base a lien in jurisdictions where there are no statutory regulations giving such effect to a waiver of the exemption.

It is further affirmed as a principle of law that by the filing of the complaint in this cause, which complaint, it is asserted, should be treated as a creditors' bill, a lien was thereby acquired, citing 12 Cyc. 61. The principle sought to be invoked, however, is without application here. It relates to a condition where a creditor, who by his superior diligence has discovered or uncovered property which could not be seized on an execution at law, is awarded a lien in preference to other creditors who may act with less celerity and success, but such suits are based upon existing indebtedness, and generally upon judgments theretofore obtained, and could not be maintained without such foundation for their support, so that the conditions are entirely dissimilar to those paramount in the case at bar.

This answers seriatim the several positions of counsel whereby it is urged that equitable jurisdiction ought to attach in the present suit. Where there is a lien, as in the case of a mortgage, it may be enforced, although the debt is barred by the statute of limitations; but where there is no lien, and the debt is barred, a remedy that was alone at law is entirely lost. So it must be in the present case. The debtor having been discharged by the bankruptcy proceedings before the plaintiff attempted to enforce her demands, her remedy is entirely swept away, unless the bankrupt has waived the discharge. If prior to the bankrupt's discharge plaintiff had taken proper action with a view

to subjecting this property to the payment of her demands, there is little question that the federal court would have withheld the discharge until ample opportunity would have been afforded for the accomplishment of the purpose, and the remedy at law would perhaps have been adequate: *Bell v. Dawson Grocery Co.* 120 Ga. 628 (12 Am. Bankr. Rep. 159, 48 S. E. 150); *Lockwood v. Exchange Bank*, 190 U. S. 294 (23 Sup. Ct. 751, 47 L. Ed. 1061); *Sharp v. Woolslare*, 25 Pa. Super. Ct. 251 (12 Am. Bankr. Rep. 396); *Powers' Dry Goods Co. v. Nelson*, 10 N. D. 580 (88 N. W. 703, 58 L. R. A. 770). But having waited until the debts were themselves discharged, she is now remediless in either forum. The decree of the circuit court will therefore be affirmed.

AFFIRMED.

Argued 9 February, decided 27 March, 1905.

HARDING v. HARDING.

80 Pac. 97.

INFANTS—VALIDITY OF JUDGMENT AGAINST.

1. A judgment or decree against an infant by a court having jurisdiction of the subject and of the parties is as valid as one entered against an adult.

LEGAL CAPACITY OF INFANTS TO PERSONALLY ASSERT AN ADVERSE CLAIM TO REAL PROPERTY—QUIETING TITLE.

2. An adverse claim to an interest in real property, within B. & C. Comp. § 516, providing that any person claiming such an interest in land not in the actual possession of another may sue in equity another who claims an interest therein adverse to him, is the expressed assertion of a right by a claimant of suitable age and sufficient intelligence.

PRACTICE OF SUPREME COURT IN DISPOSING OF CAUSE AFTER AFFIRMING FINAL ORDER ON DEMURRER.*

3. After a decision by the supreme court affirming the ruling of the trial court on a demurrer it is discretionary to affirm the order appealed from, which will end the case, or to remand the cause for further proceedings.

From Marion: REUBEN P. BOISE, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by Charles Harding against Merlin Harding and others, minors, to determine an adverse claim to real property.

*NOTE.—This point is decided in *Powell v. Dayton, S. & G. R. E. Co.* 14 Or. 22 (12 Pac. 83); *State ex rel. v. Metschan*, 32 Or. 372 (53 Pac. 1071); *McLeod v. Lloyd*, 43 Or. 260 (74 Pac. 491); and *McFarlane v. McFarlane*, 43 Or. 477 (73 Pac. 203).

This rule is assumed as the basis of the court's action in the following named cases: *Fowle v. House*, 30 Or. 305 (47 Pac. 787); *Lieualten v. Mosgrove*, 33 Or. 282 (54 Pac. 200); 37 Or. 446, 448 (61 Pac. 1022). See, also, as illustrative, *McFarlane v. McFarlane*, 45 Or. 360, 362 (77 Pac. 837).

The complaint states, in effect, that the plaintiff, Charles Harding, is the owner and in the possession of the donation land claim of Narcisse A. Cornoyer and wife, in Marion County, and that the defendants Merlin Harding and Clara Harding, who are 19 and 15 years old, respectively, claim an interest or estate in the premises adverse to plaintiff. The prayer is that they may be required to set forth the nature of their claim, that it may be decreed that neither of them has any interest or estate in the land, that they may be enjoined from asserting any claim thereto adverse to plaintiff, and for general relief. The defendants, appearing by their guardian ad litem, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit. The demurrer was overruled, and, the defendants declining further to plead or answer, a decree was rendered as prayed for in the complaint, and they appeal.

AFIRMED BUT REMANDED.

For appellant there was a brief over the names of *L. H. McMahon* and *George G. Bingham*, with an oral argument by *Mr. Bingham*.

For respondent there was a brief over the names of *W. H. & Webster Holmes* and *R. & E. B. Williams*, with an oral argument by *Mr. Emmet B. Williams*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is maintained by defendant's counsel that a minor is incapable of making a valid claim to an estate or interest in real property, and, though his regularly appointed guardian might effect such a claim for him, because the guardian is entitled to the possession of his ward's lands, the complaint does not allege that the defendants had such a representative, and hence the court erred in overruling the demurrer. The doctrine contended for seems to find expression in the case of *Bailey v. Southwick*, 6 Lans. 356, where, in speaking of some of the parties, the court say: "Three of the defendants are infants, and incapable of admitting jurisdiction or of making unjust claim of title." The statute of New York in force when that decision was rendered prohibited the bringing of actions against infants

to compel the determination of an adverse claim to real property: *Mutual Life Ins. Co. v. Holloday*, 13 Abb. N. C. 16. The statute of this State does not contain such an interdiction, and is as follows: "Any person claiming an interest or estate in real estate not in the actual possession of another may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests, or estates": B. & C. Comp. § 516. In a suit where the court has complete jurisdiction of the subject and of the parties, a decree rendered against infant defendants, where there is no evidence of fraud or collusion, is as valid and effectual as if taken against adults: *English v. Savage*, 5 Or. 518; *Savage v. McCorkle*, 17 Or. 42 (21 Pac. 444).

2. As it is possible, in a suit in equity, to secure adequate relief against minors, it remains to be seen whether or not they can, without the intervention of a legally appointed guardian, make a valid claim to an estate or interest in real property adverse to the alleged owner, who is in the possession thereof. The inquiry involved necessitates an examination of what act on the part of any person initiates such claim.

In *Murphy v. Sears*, 11 Or. 127 (4 Pac. 471), it was ruled that persistent attempts on the part of the defendants therein to have the real property claimed to be owned by plaintiffs sold on execution constituted the inauguration of an adverse claim to the premises, within the meaning of the statute. If an "adverse claim" to an estate or interest in real property can be established in no other manner than by an effort on the part of the claimant to disturb the possession of the alleged owner, either by bringing an action to try the title, or by an attempt to sell the premises on execution, it is quite probable that an infant, without the aid of a guardian, is incapable of instituting such claim. An "adverse claim" to an estate or interest in real property, within the meaning of the statute under consideration, is, in our opinion, the expressed assertion of a right to the premises by the claimant; and the commencement of an action to try the title, or an attempt to sell, lease, or dispose of the land, by the person out of possession, affords evidence of such

claim. Thus, in *Miles v. Strong*, 68 Conn. 273 (36 Atl. 55), it was held that an expressed assertion by a person of some interest in real property in the possession of another, who claimed an estate therein, created such a conflict of alleged ownership as authorized the latter to maintain a suit to determine the adverse declaration of right. So, too, in *Curtis v. Sutter*, 15 Cal. 259, in construing a statute of California similar to ours, it was ruled that a party in possession of land might bring a bill in equity to quiet the title against the party out of possession, who claimed an estate or interest adverse to him, without waiting until he had been disturbed in his possession by legal proceedings instituted against him. In deciding that case, Mr. Chief Justice FIELD, speaking for the court, says: "It is sufficient if, whilst in the possession of the property, a party out of possession claim an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed and judicially determined, and the question of title be thus forever quieted."

The expressed assertion of an adverse claim to an estate or interest in real property, made by a person out of possession, in the presence of others, necessarily creates a suspicion in respect to the validity of the title of the person in possession of the land, claiming to be the owner thereof, and such distrust is measured by the credence given by the hearers to the declaration of right thus asserted in their presence. An infant who has attained suitable age and sufficient intelligence and discretion to cause his expressed assertions generally to be believed can probably affect the person in possession of real property, claiming to be the owner thereof, more injuriously, and inflict greater damage, by adversely claiming an estate or interest in the premises, than can ordinarily result from such a claim when made by an adult, for the latter, having reached his majority, can convey any right or title thereto by deed, but the infant, in consequence of his nonage, cannot transfer his estate, thereby possibly preventing a sale of the land until he becomes of age, or until, by a suit instituted for that purpose, his

adverse claim has been determined. An infant who possesses the knowledge and prudence thus indicated can, in our opinion, without the intervention of a guardian, express an assertion of an adverse claim to an interest or estate in real property which is in the possession of and claimed by another person, thereby authorizing the latter to institute a suit to determine such claim, and, if found to be without right, the infant will be enjoined from further asserting his claim; but, if such claim be ascertained to be well founded, the right of the adverse claimant will be protected. We think it must be assumed that the defendants, who are alleged to be nineteen and fifteen years old, respectively, when this suit was instituted, had attained that period in their lives, and reached that degree of acumen and judgment, to entitle them, without the aid of a guardian, to express such an assertion of claim to an interest or estate in the land in question as to cause their declarations generally to be believed.

3. The complaint was therefore sufficient, and no error was committed in overruling the demurrer; but the cause will be remanded for such further proceedings as may be necessary, not inconsistent with this opinion: *Powell v. Dayton, S. & G. R. R. Co.* 14 Or. 22 (12 Pac. 83).

AFFIRMED BUT REMANDED.

Argued 25 October, decided 28 November, 1904, rehearing denied.

LEWIS v. FIRST NATIONAL BANK.

78 Pac. 990.

TRIAL BY COURT—SCOPE OF FINDINGS.

1. A finding of fact by a trial judge sitting without a jury that finally determines the case often renders findings on intermediate issues unnecessary, and it is not prejudicial error to refuse findings on such issues. For example: In an action for money by an assignee of a claim, after findings for defendant on the question of indebtedness, it is immaterial who owns the claim, and a refusal to find on that issue is not error.

TRIAL BY COURT—SUFFICIENCY OF FINDINGS.

2. Findings that a debtor pledged to its creditor a warehouse receipt for sundry chattels, that the obligation thus secured was not paid at maturity, in consequence of which the creditor sold the chattels pursuant to the terms of the pledge, impliedly finds that the property pledged was delivered to the creditor, as a warehouse receipt stands for the property stored.

BANKRUPTCY—AVOIDANCE OF PREFERENCES.

3. Under the bankruptcy act of 1898 (30 Stat. U. S. 562, c. 541, § 60b), providing for a recovery by the trustee of property given by a bankrupt as a preference, only the trustee can avoid the act and proceed against the one who received the preference.

MATERIALITY OF FINDINGS.

4. A bankrupt having within four months of being adjudged insolvent pledged a warehouse receipt to a bank as security for a note for money then borrowed, with provision that, if the note was not paid at maturity, the bank might sell the security and with the proceeds discharge such note, and credit the surplus on prior notes of the bankrupt to the bank, and the trustee having sold and assigned the claim for the surplus, and the assignee having sued only for such excess—there is no disaffirmance, but a ratification, of the act of the bankrupt; so that the question of the bank having cause to know that a preference was intended is immaterial.

BANKRUPTCY—ESTOPPEL ON CREDITOR TO CLAIM SECURITY.

5. Where a bankrupt pledged a warehouse receipt as security for a note given for money then borrowed, with provision that if such note was not paid at maturity, the pledgee might sell the paper, and, after satisfying such note, apply the surplus proceeds to prior notes, the pledgee, by filing a claim in the bankruptcy proceedings for the full amount of its claim, without giving any credit thereon for such surplus proceeds, is not estopped to claim the same as security when sued therefor; there having been no fraud, the pledgee having at the time of filing the claim received no money from the pledge, and having, shortly after filing its claim, withdrawn it, and received nothing from the bankrupt's estate.

VARYING WRITING BY PAROL—COLLATERAL ORAL AGREEMENT.

6. It may be shown by parol that at the time a warehouse receipt was pledged to secure a loan evidenced by a note it was agreed that the surplus proceeds from the sale of the pledged property, after payment of such note, might be applied on prior notes of the pledgor held by the pledgee, this agreement being oral and collateral to the writing showing the indebtedness.

TIME FOR ENTERING JUDGMENT AFTER FILING FINDINGS.

7. It is not error to enter judgment the day after the findings of fact are filed, where no motion for new trial is pending.

From Multnomah: MELVIN C. GEORGE, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This is an action by A. T. Lewis, substituted for J. Crane, to recover money. The complaint states that the defendant, the First National Bank of Portland, and the Oregon Pulp & Paper Co., are corporations; that on July 22, 1901, a petition having been filed in the United States District Court for the District of Oregon praying that the latter corporation might be adjudged a bankrupt, a decree to that effect was rendered therein August 19, 1901, and E. E. Merges duly appointed trustee; that on June 15, 1901, the Oregon Pulp & Paper Co. sold and delivered to defendant paper of the reasonable value of \$2,200, which sum it agreed forthwith to pay, but had paid no part thereof except \$1,500; that on June 21, 1902, the trustee in bankruptcy, for a valuable consideration, sold, assigned, and transferred such account and claim to plaintiff, no part of which had been paid—wherefore he demands the sum of \$700, with interest

thereon from June 15, 1901. The answer denies all the allegations of the complaint, except the existence of the corporations, and that the Oregon Pulp & Paper Co. was adjudged a bankrupt. For a further defense it avers that on June 14 and 25, 1900, the Oregon Pulp & Paper Co. executed to the defendant promissory notes drawing 8 per cent interest, payable in 90 days from such dates, and for the sums of \$7,000 and \$3,000, respectively; that no payments had been made thereon except the interest on each for nine months and the sum of \$410.91 on account of the principal; and that such notes constitute a set-off to the claim alleged in the complaint. The reply states, in effect, that defendant ought not to be permitted to set off any sum alleged to be due on the two notes executed to it by the Oregon Pulp & Paper Co., for that at the time they were given, and long prior thereto, the maker was insolvent, "all of which the defendant had reasonable cause to believe and know and did know"; that with intent to gain a preference, and with knowledge that the Oregon Pulp & Paper Co. intended to give it, the defendant took from such company a mortgage, to secure the payment of the two promissory notes, of certain real and personal property, which security was given with intent to prefer the defendant, as it "had reasonable cause to believe and know and did know"; and that the mortgagor was adjudged a bankrupt within four months thereafter. For a second reply it is averred that defendant ought not to be allowed to assert that any sum due on its two promissory notes constitute a set-off against plaintiff's claim, for that during the months of June and July, 1901, and for a long time prior thereto, the Oregon Pulp & Paper Co. was insolvent, "all of which the defendant at all of said times had reasonable cause to believe and know and did know," notwithstanding which it took from the Oregon Pulp & Paper Co. the goods mentioned in the complaint; and that to allow any part of the two promissory notes to be set off against plaintiff's claim would create a preference over the other creditors of the bankrupt, to plaintiff's damage.

For a third reply it is stated that the defendant ought not to be heard to say that any part of the sums due on its promissory

notes should be set off against plaintiff's claim, for that on September 11, 1901, the defendant appeared before the referee in bankruptcy, and proved its demands, evidenced by such promissory notes, against the bankrupt estate of the Oregon Pulp & Paper Co. and claimed the principal sums named in each as due, allowing no credits on account thereof except for interest, thereby intentionally causing the trustee in bankruptcy and the plaintiff to believe that it had no just right to the claim sought to be recovered in this action, and would make no demand therefor; all of which was to its advantage and to plaintiff's injury; and that the trustee, relying thereon, caused the claim set out in the complaint to be listed and appraised, and now to allow a set-off against it would be to plaintiff's injury. For a fourth reply it is alleged that defendant ought not to be authorized to set off any part of the sums due on its notes against plaintiff's claim, for that on July 21, 1901, it commenced a suit in the Circuit Court of the State of Oregon for Multnomah County to collect its two promissory notes and to foreclose its mortgage, but did not give the Oregon Pulp & Paper Co. credit on account of any of the paper received, thereby intentionally leading the trustee in bankruptcy and the plaintiff to believe that no claim would be made to the fund of the bankrupt's estate, causing the trustee to inventory the claim sued on in this action, and plaintiff, relying on such conduct, purchased the chose in action; and that if the plea of set-off be permitted, plaintiff will sustain damage, for which reasons the defendant is, and of right ought to be, estopped from asserting the same against his demand. The cause being at issue was tried without the intervention of a jury, the court stating the conclusions of fact and of law found, and, judgment having been rendered thereon dismissing the action, plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Horace Brown Nicholas*.

For respondent there was a brief and an oral argument by *Mr. Milton W. Smith*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

The only question presented for review is whether or not the findings support the judgment. The first three findings are unimportant, and state, in effect, that the defendant, the First National Bank of Portland, Oregon, and the Oregon Pulp & Paper Co. are corporations doing business within this State, and that on August 19, 1901, the latter company was duly adjudged a bankrupt in pursuance of a petition praying therefor filed July 22, 1901. The other findings of fact are, in substance, as follows:

"(4) That the Oregon Pulp & Paper Co. did not sell to the defendant any paper, nor did the latter agree to pay any sum therefor, nor is any sum due from it to plaintiff on account thereof.

(5) That the Oregon Pulp & Paper Co. executed to the defendant the two promissory notes described in the answer, on each of which the interest for nine months had been paid and the sum of \$410.91 on account of principal.

(6) That on June 20, 1901, the Oregon Pulp & Paper Co. secured from defendant a loan of \$1,500, giving its note therefor, due in 60 days, with 8 per cent interest, securing payment thereof by pledging warehouse receipts of manufactured paper, it being agreed that, if this note was not paid at maturity, the defendant was authorized to sell the paper, discharge the debt for which it was hypothecated, and credit the surplus on the notes aggregating \$10,000.

(7) It was further agreed between the maker and the payee of the notes for \$7,000 and \$3,000, respectively, that in consideration of the loan of \$1,500 the Oregon Pulp & Paper Co. would execute to defendant a second mortgage on its property to secure the payment of the \$10,000 indebtedness.

(8) That, the note for \$1,500 not having been paid at maturity, defendant sold the manufactured paper, realizing therefor \$1,955.67, and, after deducting all expenses, applied the sum of \$1,544.76 in discharging such note, and credited the remainder of \$410.91 on the other notes.

(9) That the paper company, in pursuance of its agreement, executed to defendant a second mortgage, but, a prior incumbrance having exhausted all the property hypothecated, nothing was realized therefrom.

(10) That on June 20, 1901, when the note for \$1,500 was given and the second mortgage executed, 'defendant did not know, or have reasonable cause to know, that the said Oregon Pulp & Paper Co. was insolvent.'

(11) That the \$1,500 was loaned and the second mortgage taken in good faith, and without intent to obtain a preference over the other creditors of the Oregon Pulp & Paper Co.

(12) That on September 11, 1901, defendant filed in the bankruptcy proceedings instituted against the Oregon Pulp & Paper Co. a claim for \$10,000 and interest, as evidenced by its two promissory notes, but no credit was given for the manufactured paper, because at that time no money had been received therefor, for which reason the defendant is not estopped from claiming the proceeds thereafter arising from the sale of such property.

(13) That on July 5, 1901, defendant commenced a suit to foreclose its second mortgage, given to secure the notes amounting to \$10,000, and in the complaint no credit was alleged on account of such manufactured paper, because at that time no money had been received therefrom, and that any omission in this respect does not estop the defendant from claiming the proceeds thereafter arising from the sale of the property pledged to it."

The court having declined plaintiff's request to find that the manufactured paper in question was delivered to defendant, or that the claim sued on was assigned to him, he contends that these facts were material to the issue, and that the refusal to make findings thereon constitutes reversible error.

1. When a court tries a cause without a jury, it must make findings of fact covering all the material issues, which, when entered in the journal, are tantamount to special verdicts, and constitute the foundation of the judgment; but, in the absence of a finding on a matter essential to the right of action or defense, such judgment must fail for want of support: *Moody v. Richards*, 29 Or. 282 (45 Pac. 777); *Daly v. Larsen*, 29 Or. 535 (46 Pac. 143); *Breding v. Williams*, 33 Or. 391 (54 Pac. 206); *Wright v. Ramp*, 41 Or. 285 (68 Pac. 731). Though the findings required to be made must be responsive to and cover all the material issues of the case, the court's conclusion on a part of them may be such as to render the others unimportant, and findings thereon superfluous. Thus, in an action of ejectment, the court having found that plaintiff was never the owner nor entitled to the possession of the demanded premises, it was held that no error was committed in failing to find upon the issue of the statute of limitations: *Porter v. Woodward*, 57 Cal.

535; *McCourtney v. Fortune*, 57 Cal. 617. In *Quinn v. Anderson*, 70 Cal. 454 (11 Pac. 746), which was a suit to enjoin the defendants from obstructing an alleged highway across their premises, and to recover damages resulting from prior interference with travel thereon, the court having found that no public road existed as alleged, and that the locus in quo belonged to the defendants, it was held that the issue raised in respect to the question of damages became immaterial, rendering a finding thereon unnecessary. So, too, in *Diefendorff v. Hopkins*, 95 Cal. 343 (28 Pac. 265, 30 Pac. 549), it was ruled that a judgment for the defendant for costs, based on findings in his favor in an action for the conversion of goods, was not rendered erroneous by the absence of an express finding on the issues of value and damages. Reason maintains the rule that when, in an action tried without a jury, the court finds on an issue that ultimately determines and necessarily supports the judgment rendered, other issues in the case become immaterial, and a failure to find thereon does not constitute prejudicial error. If the plaintiff had recovered in the action, a finding that the claim sued on had been transferred to him would probably have been necessary as a basis for the judgment; but, as the defendant prevailed, it is wholly immaterial whether or not the alleged assignment was made to plaintiff.

2. It will be remembered that the court found that the Oregon Pulp & Paper Co. pledged to the defendant warehouse receipts of manufactured paper as security for a loan of \$1,500, stipulating that, if default was made in the payment of the note evidencing that sum, the defendant was authorized to sell the paper, discharge the obligation for which it was pledged, and credit the surplus on the \$10,000 indebtedness; and that, the note not having been paid at maturity, the defendant, in pursuance of such agreement, sold the paper. The statute of this State makes a warehouse receipt negotiable, a transfer of which is accomplished by indorsement of the party to whose order it is issued: B. & C. Comp. § 4606. The property deposited in a warehouse is represented by the receipt, an assignment of which transfers the property itself: *Anderson v. Portland Flouring*

Mills Co. 37 Or. 483 (60 Pac. 839, 50 L. R. A. 235, 82 Am. St. Rep. 771); *Adamson v. Frazier*, 40 Or. 273 (66 Pac. 810, 67 Pac. 300). "A delivery of the receipt," says Mr. Justice LORD in *Solomon v. Bushnell*, 11 Or. 277, 279 (3 Pac. 677, 50 Am. Rep. 475), "has the same effect in transferring the title to the property as the delivery of the property." Default having been made in the payment of the note for the security of which the warehouse receipts were pledged, the title to the paper upon such default immediately vested in the defendant, which was entitled to the possession thereof; and the court, having declared that the property was sold by the defendant, thereby impliedly found that the paper was, in legal effect, delivered to it, and the finding in this respect is sufficient.

3. The findings having disclosed that the warehouse receipts were pledged to defendant June 20, 1901, as security for a loan, and that within four months thereafter the pledgor was adjudged a bankrupt, it is insisted by plaintiff's counsel that the finding to the effect that at the time the loan was made defendant "did not know or have reasonable cause to know" that the Oregon Pulp & Paper Co. was insolvent is not sufficient to uphold the judgment. The act of Congress of July 1, 1898, to establish a uniform system of bankruptcy throughout the United States, contains, among others, the following provision: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition, or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person: 30 Stat. U. S. 562, c. 541, § 60b (3 U. S. Comp. St. 1901, p. 3445, 1 Fed. Stat. Ann. 525, 674). If this were an action by the trustee in bankruptcy to recover from the defendant the property pledged, or its value, a very different question might be presented; for to defeat the right in such case it would be necessary for the defendant to show that its agent, in taking the security for the loan, within the time mentioned, did not have reasonable cause to believe

that the pledge was intended by the Oregon Pulp & Paper Co. as a preference. In *Falco v. Kaupisch Creamery Co.* 42 Or. 422 (70 Pac. 286), it was held that the trustee in bankruptcy was the only person who could sue to recover unpaid stock subscriptions from the stockholders of an Oregon corporation. In *Morgan v. Abbott*, 148 Mass. 507 (20 N. E. 165), it was held that in case of fraudulent conveyances which might be avoided by creditors the assignee in insolvency of the grantor, having the right to elect whether to avoid or affirm it, must distinctly manifest his election to avoid it before he could transfer to a third person his right to contest its validity, the court saying: "The same rule should apply in cases of preference, or of a conveyance made with a view to prevent the property from coming to the assignee, which the assignee might avoid." In *McMaster v. Campbell*, 41 Mich. 513 (2 N. W. 836), it was held that an assignee in bankruptcy, as the representative of the bankrupt's creditors, is the proper person to take proceedings in their behalf to set aside conveyances made by the bankrupt in fraud of their rights, and if he refuses to perform this duty their remedy is by application to the court which appointed the assignee. In *Allen v. Montgomery*, 48 Miss. 101, it was held that property conveyed by a bankrupt in fraud of his creditors became vested by law in his assignee, and he alone had the right to reach and subject it to the payment of debts.

4. In the case at bar the plaintiff does not desire to rescind the pledge, for he concedes that the note intended to be secured thereby should be paid, and seeks only to recover the value of the property in excess of such indebtedness. This is a ratification of the act of the bankrupt, and not in disaffirmance thereof, and, this being so, it is unimportant whether defendant had reasonable cause to believe that the pledge was intended as a preference. The finding that it did not know, or have reasonable cause to know, that the Oregon Pulp & Paper Co. was insolvent seems to have been invited by the language of the reply, but, however this may be, the finding is immaterial, and no prejudicial error can result therefrom. The right to treat the pledge as a preference being vested exclusively in the trustee

in bankruptcy, does not deny plaintiff's authority to maintain this action, which proceeds on the assumption that after the payment of the note secured by the pledge of the warehouse receipts the surplus arising from the sale of the property is an asset of the Oregon Pulp & Paper Co. constituting a chose in action which the trustee, in order to facilitate a speedy settlement of the bankrupt's estate, could sell and assign, but such transfer is an express recognition of the validity of the security, and only seeks to recover such surplus.

5. It is maintained by plaintiff's counsel that defendant, having filed in the bankruptcy proceedings a claim for \$10,000, evidenced by the notes for \$7,000 and \$3,000, respectively, giving no credit for any surplus applicable thereto from the sale of the paper pledged to it after discharging the \$1,500 note, thereby waived its security if any existed; and that the statement by the court that because no money had been received from this source September 11, 1901, when defendant's claim was presented to the trustee, the omission to give the credit did not estop it from claiming the proceeds of such sale, is not a finding of fact, but an unwarranted conclusion of law. The cases cited in support of the waiver insisted upon are *Brown v. Farmers' Bank*, 6 Bush (Ky.), 198, and *Russell v. Owen*, 61 Mo. 185. These decisions were based on a construction of section 21 of the bankruptcy act of March 2, 1867 (14 Stat. U. S. pp. 517, 526, c. 176, § 21; Rev. Stat. U. S. § 5105), which, so far as deemed involved herein is as follows: "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby." This act was repealed June 7, 1878: 20 Stat. U. S. 99, c. 160. The act of Congress of July 1, 1898, does not contain any provision similar to the section a part of which is quoted, and hence the cases cited can have but little application to the question involved.

"A secured creditor," says Mr. Loveland in his *Law of Bankruptcy* (2 ed.), § 134, in construing the present bankrupt act, "can resort to one of three remedies: First, he may rely upon his security; second, he may surrender it, and prove the whole debt as unsecured; and, third, he may be admitted only as a creditor for the balance remaining after the deduction of the value of the security." Under the present bankruptcy law a creditor, unless guilty of fraud, or who has secured an undue advantage, may change his proof in form from an unsecured to a secured debt: *In re Fall City Shirt Mfg. Co.* (D. C.) 98 Fed. 592; *In re Wilder* (D. C.), 101 Fed. 104. Such amendments may be permitted after the expiration of the year in which claims may be proved, and the prior receipt of dividends does not preclude the court from permitting such amendment: *Hutchinson v. Otis*, 190 U. S. 552 (23 Sup. Ct. 778, 47 L. Ed. 1179); *In re Parkes*, 10 N. B. R. 82 (Fed. Cas. No. 10754). As the defendant could have amended its proof, so as to show that after the payment of the \$1,500 note the surplus, if any, arising from the sale of the manufactured paper, was to be applied on the \$10,000 indebtedness, we think the court's statement that the defendant was not estopped by its omission in this respect tantamount to a finding that it was not guilty of fraud, and that no error was committed in making it. This conclusion is supported by the bill of exceptions, which shows that the referee in bankruptcy before whom the cause was pending, as defendant's witness, testified that on October 18, 1901, the claim for \$10,000, filed in the bankruptcy proceedings September 11, 1901, against the Oregon Pulp & Paper Co., was withdrawn with his approval, and the defendant never participated in the fund nor received any money from the bankrupt's estate.

6. W. C. Alvord, the defendant's second assistant cashier, appearing as its witness, was permitted to testify over plaintiff's objection and exception that warehouse receipts were pledged to his principal to secure a loan of \$1,500, under an agreement entered into with the president of the Oregon Pulp & Paper Co. that, if the note evidencing the loan was not paid at maturity, the surplus arising from the sale of the property pledged should

be credited on the \$10,000 indebtedness, and that in pursuance of such agreement \$410.91 was so applied. Based on this testimony, the court having made a finding in conformity therewith, it is urged by plaintiff's counsel that the evidence was incompetent to prove the agreement in respect to the application of the surplus, and that an error was committed in admitting the testimony and in making such finding. In *Looney v. Rankin*, 15 Or. 617 (16 Pac. 660), Mr. Justice THAYER, recognizing the existence of the rule that evidence of a contemporaneous parol agreement was inadmissible to vary the terms of a written contract, says: "The rule here referred to, so far as it extends, is inflexible. But it has been held not to extend to a collateral parol agreement or independent facts which do not interfere with the terms of the written contract, though it may relate to the same subject-matter, and have occurred contemporaneously with or preliminary to the main contract in writing." The legal principle thus announced is amply supported by the decisions of the courts of last resort, and, though the loan of \$1,500 was evidenced by a written agreement, the pledge of warehouse receipts as security therefor was collateral thereto, and, in our opinion, parol evidence was properly admissible, to prove not only the payment of the note, but after its discharge the application of the surplus arising from the sale of the paper on the indebtedness of \$10,000, in case default was made in discharging the note for the payment of which the pledge was given, and that no error was committed in making a finding to that effect.

7. The findings of fact were filed June 2, 1903, and judgment given thereon the next day, and it is argued by plaintiff's counsel that the decision was prematurely entered. No motion for a new trial was pending at the time the judgment was rendered, and, one day having intervened after the findings were filed, no error was committed in entering the judgment, which is affirmed.

AFFIRMED.

Argued 24 January, decided 27 March, 1905.

PACIFIC EXPORT CO. v. NORTH PACIFIC LUMBER CO.

80 Pac. 105.

QUESTION FOR JURY.

1. The evidence, while conflicting, is quite sufficient to sustain the finding of the jury in plaintiff's favor, and the conclusion thus made will not be reviewed.

TERMS OF CONTRACT A JURY QUESTION.

2. Where a contract, as finally developed, was the result of several conferences and conversations, the question as to what the terms were in its final conclusion was properly submitted to the jury.

CONSTRUCTION OF CONTRACT—MEANING OF TERMS.

3. The employment of the word "sell" in the memoranda exchanged during the preliminary discussion of the terms of a contract, which was the result of several conferences and conversations, is not conclusive, as matter of law, as to the nature of the contract.

REFUSING IRRELEVANT INSTRUCTIONS.

4. Requested instructions not applicable to any theory of either party should be refused.

REFUSING INSTRUCTIONS ALREADY GIVEN.

5. A trial judge need not repeat an instruction that has already been either literally or substantially given.

MEMORANDUM RECEIVED—EVIDENCE OF AS AN ADMISSION.

6. A memorandum of the terms of a proposed contract, prepared by one of the negotiating parties and delivered to the other, who made no objection thereto, is competent in an action involving the terms of the agreement as an admission by the receiving party.

RIGHT OF WITNESS TO EXPLAIN HIS TESTIMONY.

7. A witness is entitled to an opportunity to explain words or expressions used by him in testifying and which he thinks may not have been understood as he meant them.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

Action by the Pacific Export Lumber Co. against the North Pacific Lumber Co. Both plaintiff and defendant are corporations.

The plaintiff's cause of action is stated, in substance, as follows: That, prior to November 25, 1901, plaintiff and defendant entered into a contract whereby it was agreed that the defendant should, at its own cost and expense, complete a dredge then in course of construction, and thoroughly equip the same with tools, machinery, appliances, etc., so that nothing else of the kind would be required for its operation, except such as might be needed for subsequent repairs; that a corporation should be formed with a capital stock of \$100,000, to be styled the Portland Dredging Co., and empowered to build, acquire, and operate dredges, and to do all things necessary and proper to the carrying on of the dredging business; that, when com-

pleted, the dredge should be conveyed to the dredging company in exchange for \$50,000 of its capital stock, the other moiety of its stock to remain in the treasury of the company, to be issued as its business might require; that of the \$50,000 so to be issued, one half, or \$25,000 thereof, should be delivered to the defendant, and the other half to William D. Wheelwright, the manager for plaintiff, for its account, in consideration for which plaintiff was to pay the defendant the sum of \$12,500 in cash; that thereafter, and on or about the day above named, and pursuant to said contract, the defendant caused the Portland Dredging Co. to be duly incorporated and organized with Donald Mackay as president and treasurer, E. T. Williams as vice president and manager, and W. B. Mackay as secretary and assistant manager; that on or about December 26, 1901, the plaintiff, on being informed by defendant that the dredge was completed and the dredging company organized, paid to defendant the sum of \$12,500; that thereafter, about January 1, 1902, the defendant transferred and conveyed the dredge to the dredging company, and caused it to be received by such company in payment for 500 shares of its capital stock, the par value being \$100 per share, and that ever since the last-named date the dredge has been owned, maintained, and operated by the dredging company; that the officers and directors of the dredging company are all officers and agents of the defendant company; that upon the representation of the defendant that it was desirable to replace the engine then in use in the dredge with a larger and more powerful one, and that the difference between the cost of a new engine and the value of the old would be \$6,000, at the request of the defendant, plaintiff, on or about September 9, 1902, paid to defendant the further sum of \$3,000, being one half the amount of such difference, whereupon plaintiff demanded that defendant cause to be issued and transferred to plaintiff 250 shares of the capital stock of the dredging company, and thereafter, and especially on February 24, 1903, repeated such demand, but that defendant refused to deliver the same or any part thereof, except 248 shares, which it offered to deliver to plaintiff, but which plaintiff refused

to accept; that on or about said February 24, and in consequence of defendant's refusal to deliver to plaintiff said 250 shares of capital stock of the dredging company, the plaintiff notified defendant that it desired that said contract should be terminated; that thereafter defendant denied and disavowed making or entering into such contract, or that plaintiff was entitled to 250 shares, or any number of shares, of the capital stock of the dredging company, but claimed that plaintiff had purchased of defendant a one-half interest in the dredge, and was liable for one half the expenses in operating the same, and thereby wrongfully repudiated and rescinded said contract; that thereafter, to wit, about June 3, and also on June 10, 1903, the plaintiff, in consequence of said wrongful acts, elected to terminate all contracts and relations existing between plaintiff and defendant regarding said dredge, and demanded of defendant the repayment of the money paid, with interest, which it refused, and plaintiff now demands judgment accordingly.

For answer the defendant avers that on said 25th day of November, 1901, the plaintiff purchased of defendant an undivided one half interest in the dredge then under construction by the defendant at the agreed sum of \$12,500; that in said purchase it was agreed by and between plaintiff and defendant that defendant should retain control of the dredge, and maintain and operate it; that it should have the right to employ the same first for its own use, and when so employed defendant should pay for the work done at the actual cost of doing the same; that when employed in general dredging the profits and losses that might arise or be incurred should be shared equally between plaintiff and defendant; that on or about December 26, 1901, the dredge was completed, and plaintiff, in pursuance of its purchase, paid to defendant the sum of \$12,500, and that said dredge thereupon became and was thenceforth the joint property of the plaintiff and defendant; that on or about the 9th day of December, 1902, the plaintiff, under its agreement, paid to defendant the further sum of \$3,000, being one half the cost of exchanging the engines for use in the dredge; that defendant, for the purpose of retaining control and maintaining and operating said dredge,

and for greater convenience in keeping the accounts thereof, did, on November 25, 1901, cause the Portland Dredging Co. to be incorporated and organized; that on January 9, 1902, at a regular meeting of the board of directors, it was resolved that the dredging company should purchase of plaintiff and defendant, providing they were willing to sell, the said dredge, its business, good will, etc., at the agreed price of \$50,000, to be credited upon the subscription to the capital stock; that plaintiff was notified of said acts of the dredging company, but refused to convey its interest in the dredge to said company, and that by reason thereof defendant has not so conveyed its interest; that with the full knowledge and consent of plaintiff the dredging company has been allowed to operate said dredge and keep the accounts thereof; and that plaintiff has, since the 9th day of January, 1902, and up to the 24th day of February, 1903, participated in the management of said dredge; and that in the operation thereof losses have been incurred which the defendant has paid upon the faith of plaintiff's agreement to repay one half thereof to defendant, which it refuses to do; wherefore the defendant prays a dismissal of the action.

There was a judgment for plaintiff, from which defendant appealed.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Thomas Nelson Strong*.

For respondent there was a brief and an oral argument by *Mr. William Wick Cotton*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

1. The most vital difference between the parties litigant relates to a requested instruction that the jury return a verdict for defendant on the ground that the plaintiff's proofs were insufficient to support the action. The parties entertain directly antagonistic theories relative to the initial transaction giving rise to the controversy, which are well portrayed by the pleadings: one insisting that the effect of the agreement was the purchase by the plaintiff of defendant of a specified number of shares of the capital stock of the Portland Dredging Co. thereafter to be

formed, being one half the proposed issue; and the other party that its effect was simply to signify the purchase by plaintiff of the defendant of an undivided one half interest in the dredge to be operated on their joint account, and that the formation of the dredging company and the stock matter were only incidents, not affecting the sale. Owing to the vast volume of testimony in the record, we cannot undertake even to summarize it, nor is it necessary for a decision upon the question indicated. W. D. Wheelwright was the chief witness upon whom the plaintiff relies, and it will be sufficient for the purposes of this inquiry that we follow him in the merest outline of his testimony. The negotiations took place between Wheelwright, as manager of the plaintiff company, and E. T. Williams, of the defendant company. The defendant had in course of construction a dredge, and Wheelwright says he had negotiations with Williams for the purchase of it. When these began is not definitely fixed, but some time in 1901; and the parties concluded that they would form a company, and that each would take half the stock, paid up, to be issued in exchange for the dredge; that he (witness) called his stenographer, and in the presence of Williams dictated the following memorandum of the agreement, which was, however, not signed by the parties, but a carbon copy was given to Williams:

"The North Pacific Lumber Co. sell to Wm. D. Wheelwright one half interest in their new dredge, which is to be entirely finished and thoroughly equipped with all of the tools and appurtenances for the business, and in perfect repair and condition, so that no new machinery, tools or appurtenances will have to be supplied, except as may be needed in the way of repairs in the future.

"A stock company to be formed called the Portland Dredging Co. with a capital of \$100,000, of which \$50,000 is to be issued in payment for the dredge, one half to the North Pacific Lumber Co. and one half to W. D. W. The other \$50,000 to remain in the treasury, to be issued only for cash at par or property at full value—either new property to be acquired or for increase in the value of the company's assets.

"The charter of the company to be a liberal one, giving right to issue bonds, secured by mortgage or otherwise, increase the capital stock, make contracts in any part of the world, build

and acquire dredges or other machinery, hold real estate, make improvements thereon, build wharves, docks, bridges or railroads, etc.

"Officers: President, vice president, treasurer, secretary and three directors, who may fill the office of president, vice president and treasurer."

Continuing, the witness further testified that nothing more was done except they had general conversations from time to time touching the outlook of the business, when, on December 28, Williams telephoned that the dredge was completed, and witness sent him \$12,500 by check, but did not receive in return any receipt, nor did he take a bill of sale for the dredge; that it was his purpose to leave the legal ownership free, so that the transfer could be made by the defendant to the dredge company when formed, which was afterwards done; that some time afterwards Williams informed witness that the company had been formed, and that witness was to have one half the stock, but that some fears had been expressed with reference to his holding it, because of the eventual control of the concern, which the defendant company desired to retain; and that Williams proposed to turn over to witness 248 shares, and himself to hold four shares, two on account of the plaintiff and two on account of the defendant, which proposal witness declined; and that, after further parley, witness declared that there was nothing else to be done except for Williams to pay back the money and annul the contract. Witness further testified that Williams never refused to give him the 250 shares, and that he felt that sooner or later Williams would turn them over to him; that in the spring (1902) Williams suggested that it would be necessary to replace the old engine in the dredge by a new one, and that witness approved of it, for which there was an added expense, and on account of it witness later (September 9, 1902) paid to Williams \$3,000 by his check; that during the summer Williams further suggested that it would be fair that the defendant take the care of the dredge, when idle, at its own expense, in consideration that its own work be done at cost, and this was assented to as satisfactory; that the dredge had then done no work for any other person or company, although witness was under the impression

that it had; that on the day witness sent defendant his check for \$3,000 he requested that it render an account of the cost incurred by the change of the engines, with a memorandum of receipts and disbursements, as previously requested, and also that it hand to plaintiff its certificate for stock in the company, meaning the dredging company.

On November 26, 1902, the defendant wrote plaintiff, requesting a check for \$1,787.24, which it was stated was due from plaintiff to defendant for one half excess of advances made in payment of sundry bills, to which plaintiff replied on November 29:

"Our agreement was to purchase one-half interest in a completed dredge, fully equipped for work, on the basis of \$25,000.00, and we handed you a check for \$12,500.00 on the 26th of December, 1901, in full payment for said half interest. * * You have had entire control and management of the dredge, you have done everything that has been done and have paid every bill that has been paid, so that you are in a much better position to render intelligible accounts than any person that we might select to do so. Then we will examine the accounts and ask for explanations and vouchers if necessary."

On December 5 the defendant replied:

"We agree in the main with what you have set forth."

On the 24th of February, 1903, plaintiff again wrote the defendant as follows, there having been correspondence in the mean while more particularly touching the dredging account between the parties:

"In view of all the facts and circumstances mentioned above, we feel that it is out of the question for us to expect to get along together pleasantly and amicably as equal partners of the ownership of the dredge, and to avoid further controversy we think it better that the contract for the purchase by us of one-half interest in it be rescinded, which we hereby do, and will thank you to consider this letter a notice of such rescission."

Four days later the defendant wrote the plaintiff:

"Your purchase of a one-half interest in the dredge was made independently of incorporating the Portland Dredging Co. and if you are not willing to accept the certificate of 248 shares of its capital stock that we offered to you for your interest in the dredge you had a perfect right to refuse it, and we had no way of forcing it upon you nor did we wish to do so. * * As to any rescission of the original contract or purchase on account of such

small losses as may have been sustained or these long subsequent disputes and controversies the idea is absurd and cannot be entertained for a moment."

On March 3 the plaintiff again wrote the defendant:

"The reasons for the rescission were clearly stated in our letter to you of February 24, viz., the fact that mutual confidence, which is essential to equal ownership and management of property by two parties, no longer exists, and that you have refused to deliver us the 250 shares of stock to which we were entitled."

And again on June 3:

"The incorporation of the Portland Dredging Co. and the transfer of the dredge to that company was from the very beginning a part of our understanding and agreement with you. The Pacific Export Lumber Co. was willing to own stock in the Portland Dredging Co. but it was never our intention to become a partner with you or with any one else in the ownership and operation of the dredge. From the first it was agreed, as we understand it, that the Portland Dredging Co. should be incorporated and that the title to the dredge should be transferred to the Portland Dredging Co. by you, and that the stock in that company should be evenly divided, and upon the faith of this contract our money was advanced. * * We are not aware of any attempt on your part to transfer to us any interest in the dredge, or that we now hold or ever have held any interest in the dredge, but on the contrary have always understood that the title to the dredge was at first in you and was afterwards transferred to the Portland Dredging Co."

On further examination the witness testified that he never had any evidence of ownership in the dredge by certificate or otherwise; that he bought one half the dredge as he has stated, the dredge itself to be set over to the Portland Dredging Co.; that he was to have 250 shares of the stock of that company and the defendant was to have a like number of shares, but that he never received his; that he meant by the expression "bought one half the dredge" that he bought one half the stock of the company that was to own the dredge, but that he did not get it; that witness had not participated in the operation or management of the dredge in any way whatever; that he left that matter to the defendant according to agreement; that he was contented that defendant should incorporate the company and run it. This testimony is corroborated in some material particulars, and beyond

it there was offered in evidence the articles of incorporation of the Portland Dredging Co. and also certain books of account kept with reference to it, showing the organization of the company, the issuance of \$50,000 of stock, which was credited to the company against the plant, which was charged to it, and, among others, the adoption of the following resolution, to wit:

"Resolved, That this company purchase of the North Pacific Lumber Co. and Wm. D. Wheelwright the steam dredge lately constructed by the North Pacific Lumber Co. together with all of its appurtenances and all contracts for its employment, and all business, trade and good will connected therewith for the sum of fifty thousand dollars; and that said sum of fifty thousand dollars be credited in full payment of the subscription of Donald Mackay and W. B. Mackay for 248 shares, \$24,800.00; E. T. Williams for 252 shares, \$25,200.00, to the capital stock of this company, and that upon the receipt of a bill of sale of said dredge and other property from said North Pacific Lumber Co. and the delivery thereto to this company that the president and secretary of this company issue certificates of fully paid-up stock as aforesaid to said Donald Mackay, E. T. Williams and W. B. Mackay or their order."

This indicates the general outline of plaintiff's case as made by the proofs. There is much, as would naturally be supposed from the issues presented by the pleadings, in the defendant's case contradictory of this, but it does not alter the question whether plaintiff has made a case sufficient to be submitted to the jury for their consideration. It is clear to our minds that the plaintiff has substantiated by evidence pertinent to go to the jury every material phase of its theory of the case, and, having done so, the motion for a directed verdict for the defendant was properly denied.

The cursory resume we have made of the evidence indicates that there is some apparent contradiction in the chief witness's testimony and in his letters touching whether the plaintiff's contract was for one-half interest in the dredge, with the formation of the dredging company and the issuance of the stock designated as an incident thereto, or whether it was for 250 shares of the capital stock of the company with the dredge as the incident in the transaction; but this was matter very proper for the jury's

determination. It was one of fact, and the inference drawn was one fairly deducible from the evidence submitted.

2. The contract as finally developed was not one completed at one time, but was the result of several conferences and conversations, and what the terms were in its final conclusion the jury were to judge.

3. The memoranda relied upon as stating the conditions of the initiatory contract employ the term "sell," and this is relied upon as conveying a present interest in the dredge to Wheelwright; but the term is often used interchangeably as indicating a present sale or a contract to sell, and it must here be read in the light of all the other stipulations of the contract, whatever they were, and, being wholly a matter of fact, it was for the jury to say what the contract was. The word "sell," therefore, has no peculiar significance which the court could declare as matter of law under the conditions present.

It is insisted, further, that plaintiff was not in a position to rescind; that the expenditures made by the defendant in adding to the improvements of the dredge and in operating the same were with witness's full knowledge and consent, and that by not repudiating its acts in that regard promptly, it has ratified the contract, and that it is now too late for it to adopt that remedy, and that its only cause of action, if any it has, is for a breach of contract. The plaintiff replies that defendant first repudiated its contract by refusing to deliver the stock, and denying that any such contract as plaintiff is insisting upon existed. And, furthermore, that it acted promptly when it was advised by the books of the company that the dredge was not being operated as contemplated by the agreement and subsequent modifications thereof; that plaintiff was misled, and had no opportunity of ascertaining what was being done, and, as soon as it was informed of the true conditions from the statements of the books, and was advised that defendant did not intend to deliver the 250 shares of stock in the dredging company, as plaintiff alleges it promised, it rescinded at once, and insists that it had a right so to do. But this question was also a matter for the jury, they having received full and explicit instructions from the court. There

was certainly evidence upon which to base their verdict. In this connection there is a contention that the court was in error in instructing that there was nothing for the defendant to return to the plaintiff in order to place it in statu quo as a prerequisite to rescinding; the rule being that when a contract has been partially executed, and one of the parties has derived substantial benefits, or has imposed upon the others material losses, through the latter's partial performance of the agreement, then the former cannot rescind his contract on account of the failure of the latter to complete his performance: *Kauffman v. Raeder*, 108 Fed. 171, 177 (47 C. C. A. 278, 54 L. R. A. 247). In this aspect of the case, however, it was very apparent that the court was right, as the evidence showed to a demonstration, and there was nothing to contradict it; the defendant's chief witness, Mr. Williams, even admitting that the dredge was not transferred to plaintiff, but to the dredging company, and plaintiff received nothing from its operations.

4. Again, it is argued that there is another phase of the question inimical to plaintiff's rescission, which the defendant attempted to have placed before the jury by its eleventh instruction, whereby it was sought to have the court charge that, if they should find that defendant expended large sums of money in the maintenance of the dredge with plaintiff's assent or knowledge upon the faith of the contract, then that plaintiff could not rescind, and as a result could not recover in this action. There is confusion in this case by not holding in mind the respective theories upon which the parties base their action, but the learned trial judge has enunciated a clear conception of the issues. He says:

"If the contract actually was, and nothing more, that the defendant should sell a half interest in the boat to the plaintiff, and this matter of incorporating and issuing stock and carrying on the business was a mere afterthought, and no part of the original contract, not entering into the very integrity and life of the contract, inasmuch as it could not form a part of the consideration, * * you are not to give any attention to the plaintiff's view in that respect; but your verdict would be for the defendant if it was simply, as I say, a mere afterthought, or was simply a mere side issue."

Thus he put to the jury the whole of defendant's case, and it is manifest that the requested instruction had no place under that theory. Neither was it proper under plaintiff's theory, for no such expenditures could have been made, as it was one of the conditions that defendant might use the dredge for its own purposes at the cost of doing the work, and was to bear the expenses of the boat while idle, so that there could have been no outlay; the other condition being that defendant was to furnish a completed dredge for the sums advanced by plaintiff.

5. Requested instruction No. 25 is akin to No. 11, but as to that the trial court has very fully covered the subject-matter in the general charge. Requested instructions Nos. 19 and 20 were appropriate under defendant's theory of the case, but, as was the case with No. 25, the court has covered the entire subject-matter in the general charge; tersely, it is true, though not so full as it respects 25, but very aptly, and in language not to be mistaken. By the latter clause of No. 20 the court was asked to charge that, "If it [the plaintiff] failed to make any such bill of sale or transfer of its interest in said dredge to said Portland Dredging Co. then you must also find in this case a verdict for the defendant." In its general charge the court referred to the contention about the bill of sale, and stated that it did not regard the matter of any moment one way or the other. If plaintiff's theory was to prevail, the dredge passed into the hands of the dredging company from defendant, or else it remained with defendant, for plaintiff never received any transfer of title, and it was therefore not necessary that it should execute a bill of sale to the dredging company before plaintiff's right of action could accrue. If, on the other hand, defendant was to prevail, no bill of sale was then necessary, as plaintiff would be the absolute owner of one half of the dredge and the forming of the dredging company and the issuance of its stock would be a matter purely incidental, and a bill of sale by plaintiff to the dredging company could not affect the matter in any way. So that there was no error in the holding complained of. The other requested instructions refused need no special mention, being covered by the foregoing instructions.

6. There was objection to the admission in evidence of the memorandum dictated by Wheelwright in the presence of Williams, which the court overruled, and the defendant assigns error. The memorandum, under the conditions testified to by Wheelwright and corroborated by his stenographer, was admissible, if for no other purpose, as admissions of Williams, who was acting for and in behalf of the defendant as its manager: *Cars-tens v. McDonald*, 38 Neb. 858 (57 N. W. 757); *Hazer v. Streich*, 92 Wis. 505 (66 N. W. 720).

7. Another assignment of error relates to the court's permitting Wheelwright to explain what he meant by the use of the expression, "I bought half the dredge, as I stated." This was proper. The witness was still under examination, and if he gave out an erroneous impression of the facts as he understood them, he had a perfect right to make the correction in the presence of the jury. The same thing would be true if the erroneous impression were contained in a letter he had written relative to the subject, but the whole would be a matter for the jury's consideration as to the weight that should be attached to it.

The question put to the witness H. T. Groves, forming the basis of an assignment of error, was immaterial under the issues, and the one put to Williams, touching whether the dredge was delivered to the Portland Dredging Co. with the intention of carrying title, called for a deduction, which was for the jury.

Having considered all the questions presented by the transcript, and finding no error, the judgment of the circuit court will be affirmed, and it is so ordered.

AFFIRMED.

Argued 10 January, decided 6 February, 1905.

LA VIE v. TOOZE.

79 Pac. 413.

SALES—WHEN TITLE PASSES.

When property is identified by seller and buyer, weighed, marked and paid for, the sale is complete and title passes,* though the property is left with the seller under an agreement as to future delivery.

*NOTE.—See notes as follows: Essentials to a Valid Sale of Goods, 17 L. R. A. 176-181; Necessity for Delivery, 47 Am. St. Rep. 875-876; Delivery—Retention of Possession by Vendor, 60 Am. St. Rep. 237, 238.

From Marion: GEORGE H. BURNETT, Judge.

Action of replevin by George La Vie against Walter L. Tooze, resulting in a judgment for defendant. REVERSED.

For appellant there was an oral argument by *Mr. John A. Carson* and *Mr. A. M. Cannon*, with a brief over the name of *Carson, Adams & Cannon*, urging among others, these points.

This action was commenced to recover possession of a quantity of hops claimed to have been purchased by La Vie from one Kaser, and subsequently taken from him by Tooze, who also claimed to have purchased from Kaser. The case has been once to this court upon appeal: *La Vie v. Tooze*, 43 Or. 590 (74 Pac. 210). Upon a retrial La Vie, to prove a completed sale, introduced evidence to show a selection, identifying, branding, weighing, and delivery of the hops, and a payment of the whole purchase price at the agreed rate per pound. Payment was made to Kaser by check, which he accepted. There is no material dispute in the evidence as to the facts by which a sale or no sale is to be tested. The defense was that Kaser did not intend to deliver the hops. He admitted he did not communicate this intention to appellant, but on the contrary he set the hops apart, branded them for appellant and accepted his check in payment.

Upon this state of facts La Vie requested a directed verdict upon the theory that a completed sale and delivery is the only deduction, in law, to be had from the admittedly essential facts appearing in the record. This motion the court overruled and submitted the case to the jury for decision, upon the facts, as to whether there had been a completed sale. There was a verdict and judgment for defendant. Plaintiff appeals and insists here that the court erred in not directing a verdict as requested.

I. A bargain for the sale of personal property becomes a completed sale upon the marking, identifying and setting aside of the property sold as the property of the buyer by the seller, an acceptance of the same by the buyer, and payment of the purchase price: *Johnson v. Hubbard*, 29 Or. 184 (54 Am. St.

Rep. 787, 44 Pac. 287); *La Vie v. Tooze*, 43 Or. 590 (74 Pac. 210); *Scott v. King*, 12 Ind. 203; *Martz v. Putnam*, 117 Ind. 392 (20 N. E. 270); *Fordice v. Gibson*, 129 Ind. 7 (28 N. E. 303); *Baldwin v. Doubleday*, 59 Vt. 7; *Colwell v. Keystone Iron Co.* 36 Mich. 51; *Gravett v. Mugge*, 89 Ill. 218; *Rothwell v. Alves*, 61 Ill. App. 156; *Haxell v. Willis*, 15 Grat. 434; *Roil v. Little Falls Co.* 47 Minn. 422; *Lancing v. Turner*, 2 Johns. 13; *Olyphant v. Baker*, 5 Denio, 379; *Levassure v. Carey*, 3 Atl. 461 (with note); *Story, Contracts*, § 298.

II. Although the contract may specify a particular place for delivery, such provision becomes unimportant and is waived, the transit ended, and the vendor's right over the property is gone, where the buyer pays for the same or does any act equivalent to taking possession: *Baldwin v. Doubleday*, 59 Vt. 7; *Foster v. Frampton*, 13 E. C. L. 107; *Cooper v. Bill*, 3 H. & C. 727.

III. In such case, there being no material dispute over the facts, and the only legal inference deducible from such a transaction being a completed sale, the court should have directed a verdict for appellant: *Coffin v. Hutchinson*, 22 Or. 554; *Anderson v. Adams*, 43 Or. 621 (74 Pac. 215); 6 Ency. Pl. & Pr. 686, and cases cited.

IV. Where from the nature of the case it is apparent that only one of the parties to an action can, in law, prevail, on a reversal by the supreme court, as against the party who cannot prevail, a new trial should not be ordered, but the case should be remanded with instructions to render judgment notwithstanding the verdict: *Anderson v. Adams*, 43 Or. 621 (74 Pac. 215); *Bernhard v. Reeves*, 6 Wash. 424 (33 Pac. 873); *Berning v. Medart*, 56 Mo. App. 443; *Rosenfeld v. Goldsmith* (Ky.), 13 S. W. 3; *Hatley v. Pike*, 162 Ill. 241 (53 Am. St. Rep. 312); *Pennington v. Underwood*, 56 Ark. 53; *Shotwell v. Dennman*, 1 N. J. L. 396; *Stein v. Stein*, 44 Ill. App. 107.

For respondent there was an oral argument by *Mr. Geo. G. Bingham*, with a brief over the names of *L. J. Adams* and *G. G. Bingham*, to this effect.

1. In this case the sale was executory and no title passed by the hop contract prior to the delivery: *Backhaus v. Buells*, 43 Or. 558 (73 Pac. 342); *La Vie v. Tooze*, 43 Or. 590 (74 Pac. 210).

2. If by the terms of the contract the seller is required to send or forward the goods to the buyer, the title and risk remains in the seller until the transportation is at an end, after which time the title is vested in the buyer: *Julius Winkelmeyer Brew. Assoc. v. Nipp*, 6 Kan. App. 730-736 (50 Pac. 956-958); *Gipps Brewing Co. v. DeFrance*, 91 Iowa, 108 (58 N. W. 1087, 51 Am. St. Rep. 329, 28 L. R. A. 386); *Hamilton v. Gordon*, 22 Or. 557-561 (30 Pac. 495); *Buckingham v. Dake*, 112 Fed. 258-269; *Gunn v. Knop*, 73 Ga. 510; 1 Benjamin, Sales (Corbin's ed.), §§ 185, 308, 425, 427.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an action to recover possession of 40 bales of hops. The complaint is in the usual form. The answer denies the allegations of the complaint except the possession of the hops by the defendant, and alleges ownership and right of possession in him. A trial before a jury resulted in a verdict and judgment for defendant, and plaintiff appeals.

The facts are these: In January, 1902, the plaintiff and one J. R. Kaser entered into a contract by the terms of which Kaser bargained and sold and agreed to deliver to the plaintiff 8,000 pounds of hops to be grown by him during the season of 1902 on the farms of Henry and Rhoda Allen, at a stipulated price of 10½ cents per pound. The plaintiff was to advance \$80 on or before April 1 for cultivating, and five cents per pound on or before September 1 for picking and curing purposes; such advances and interest thereon to be liens on the crop. The hops were to be delivered by Kaser to the plaintiff at the Silverton depot or on board the cars at such time between the 1st and 31st of October as plaintiff might direct, and upon the delivery and acceptance the plaintiff was to pay the balance due thereon. The advances were made as agreed upon, and on October 25, after the hops had been harvested, cured and

baled, and were in condition for delivery, but while still on the Allen place, Mr. Krebs, the agent of the plaintiff, in company with Kaser and Allen, went to the building in which the hops were stored, and what there took place, and the purpose of the parties, is thus detailed by the witnesses: Krebs says he went to the house to inspect, brand, receive, and pay for the hops coming to the plaintiff under the contract with Kaser; that Allen was entitled to a certain part of the hops as rent, and went along to see that he received his proper share; that the hops were stored in the first and second stories of the building; that it was agreed between the parties that he should take the hops on the upper floor, and finish out the quantity coming to him from the lower floor; that after the division between Kaser and Allen had been made he and Allen weighed Kaser's share of the hops and at his request Kaser marked them with the brand of Krebs Brothers and the number of the lot; that the amount due Kaser was then figured up, Allen acting for him, and he (witness) gave Kaser a check on Ladd & Bush, of Salem, for the amount found due on the contract of sale after deducting advances previously made; that Kaser received such check without objection, and agreed to haul the hops for the plaintiff to Silvertown, and to ship them to him at New York; that he (witness) then filled out a shipping bill or receipt, stating the number of bales, the weight and destination, and delivered it, with the check, to Kaser, with directions to have it signed by the agent at Silvertown, and take it, with the check, to the bank, so that the bank would send the shipping bill or receipt to the Salem bank, where the plaintiffs could obtain possession of it; that the object in inspecting and branding the hops in the warehouse and giving the check to Kaser was to accept them and pay for them at that place, and pass the title to the plaintiff.

Mr. Allen testified that Kaser was a tenant of his; that on or about October 25, Krebs, the agent of the plaintiff, came out to his place to receive or take in the hops he had contracted for from Kaser; that as witness and Krebs were going to the hophouse they passed by where Kaser was sitting, and Krebs

said to him that he had come out to "take in" the hops, and Kaser said, "Go out to the hophouse, and I will be there," and came in a few minutes; that witness took out the rental due him, and he and Krebs weighed the balance, and Kaser, at Krebs's request, put the brand or mark thereon; that the amount was then figured up, and Krebs gave Kaser a check for the balance due him; that according to the understanding of the witness, Krebs came out to the farm to receive the hops and close up the transaction; that after he drew the check, and delivered it to Kaser, he instructed him to take the hops to Silverton, have the railroad agent sign a shipping receipt, which Krebs prepared and gave to Kaser at the time, and take it, with the check, to the bank; that nothing was said as to when Kaser should cash the check, and no conditions were attached to its delivery. Kaser testified that Krebs came out to the Allen place, and "we divided my part and Mr. Allen's part, and he inspected mine, and weighed them, and gave me a check for the amount, and told me to deliver them on board the cars at Silverton, and get the shipping receipt signed by the conductor, and I could get my money for them"; that Krebs came out to the place and weighed and marked the hops with the intention, as witness supposed, of getting possession of them under the contract; that witness helped him weigh and mark them, but did not then intend to deliver the hops to the plaintiff, although he did not make such intention known to Krebs. The witness further testified that at the time he received the check and shipping receipt he did not intend to deliver the hops to the plaintiff, but to sell them to another if he could do so; that he afterwards hauled the hops to Silverton, and stored them in a warehouse, and subsequently sold them to the defendant; that he marked the hops with the plaintiff's brand, and received the check in payment thereof, because he did not think it would make any difference; that he did not say anything to either Allen or Krebs indicating an intention not to deliver the hops, but supposed that they both thought he intended to do so; that on October 31 he offered to return to the plaintiff the check, and pay all advances previously made, with inter-

est. From this testimony it appears that there is no substantial controversy as to the facts, and the question on this appeal is whether, under the facts, the title to the hops passed to plaintiff at the time they were inspected, weighed, branded, and paid for on the Allen farm.

The contract between Kaser and the plaintiff made in January, 1902, was executory, and no title passed to the property therein mentioned until the hops were delivered and accepted (*Backhaus v. Buells*, 43 Or. 558, 72 Pac. 976, 73 Pac. 342); but the plaintiff was not obliged to wait until the hops had been delivered at the place mentioned in the contract before receiving and accepting them: *La Vie v. Tooze*, 43 Or. 590 (74 Pac. 210). He could receive them elsewhere; and, if they were in fact delivered to and paid for by him at the Allen farm, in pursuance of the contract, the transaction constituted a completed sale, and the title vested in him, although it was understood that the defendant was afterwards to transport the property to Silverton. The hops were ready for delivery. Nothing whatever remained to be done by Kaser to put them in deliverable condition. They were inspected, weighed, branded, and paid for by the purchaser. All that remained for the seller to do was to take them to the depot or cars, and ship them to the plaintiff at New York. By the terms of the contract the plaintiff could have insisted upon the delivery at the place specified before he received or accepted the hops, but, as he waived that right, and paid the balance due thereon at the Allen farm, the transaction is governed by the same rules as those which control the sale of specific articles of personal property. The law is that, where there is no manifestation of an intention to the contrary, the contract as between the parties is an actual sale if the specific thing is identified, agreed upon, delivered, and paid for, although it may be left in the actual custody of the seller under an agreement to deliver it in the future at some particular place. Thus, in *Scott v. King*, 12 Ind. 203, the defendant agreed to sell and deliver to plaintiff on board a canal boat 4,000 bushels of corn, payment to be made upon delivery. Two thousand bushels were delivered as agreed upon. The

remainder was not delivered at the time specified, but the defendant informed the plaintiff that the corn was in the warehouse ready for delivery whenever he would send a boat, and requested payment therefor, which was made accordingly. Before the corn was called for by the plaintiff, and while it remained in the defendant's warehouse, it was destroyed by fire. The plaintiff thereupon brought an action against the defendant to recover damages for the failure to deliver the corn, but the court held that, as the corn was set apart so that it could be identified, and had been paid for, the sale was complete, and the transfer of the corn from the warehouse to the boat, although necessary to a full performance of the contract of sale as actually made, was waived by payment before delivery. So, in this case, the provision in the contract between Kaser and the plaintiff that the hops should be delivered at a certain place was for the benefit of the plaintiff, and he waived the performance of such stipulation by receiving, accepting, and paying for them at the Allen farm. By such acts the title passed to him, and the subsequent possession of the property by Kaser was as his agent or bailee, and not as owner.

The rule, so often stated in the books, that, if anything remains to be done by the seller of personal property, the title does not pass, generally applies to things that are required to be done before delivering—such as ascertaining the identity, quality, or quantity of the article sold, or putting it in a condition which the contract required; but, as said by Mr. Justice SELDEN in discussing this question in *Terry v. Wheeler*, 25 N. Y. 520: "No case has been referred to by counsel, nor have I discovered any, in which, where the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place prevented the title from passing. If the payment was to be made on or after delivery, at a particular place, it might fairly be inferred that the contract was executory until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price of it paid, I see no room for an inference that the property remains the seller's merely because he has engaged to transport it to a given point.

I think in such case the property passes at the time of the contract, and that in carrying it the seller acts as bailee, and not as owner. The questions which arise in such cases as to sales are questions of intention, such as arise in all other cases of the interpretation of contracts; but when the facts are ascertained either by the written agreement of the parties or by the findings of a court, as they are here, they are questions of law." Now, in the case at bar, the facts are not disputed, and therefore the effect of them was not for the jury, but purely a question of law. That the title to the hops passed to the plaintiff at the time they were inspected, branded, and paid for at the Allen farm appears to us very clear. No other reasonable interpretation can be put upon the acts of the parties. Krebs went to the farm, as all agree, to "take in" the hops. With this understanding, and without objection from Kaser, he inspected, branded, received, and paid for them. No conditions were attached to the transaction, or to the delivery of the check. The latter was accepted by Kaser in payment of the hops, and he could thereafter have cashed it at any time. There was no understanding or agreement, as the position of defendant assumes, that he could not cash the check unless the shipping receipt, properly signed, accompanied it, when presented for payment. The acts of the parties amounted to more than a mere inspection and identification of the hops, leaving the delivery to be made as provided for under the original contract. They constituted a completed sale, and, if the hops had been thereafter destroyed by fire, the loss would clearly have fallen on plaintiff; or, if Kaser had become bankrupt, and made an assignment, they would not have passed to his assignee: *Martz v. Putnam*, 117 Ind. 392 (20 N. E. 270). We are of the opinion, therefore, that under the law as applied to the undisputed facts of the case the plaintiff was entitled to a recovery, and the court should have so instructed the jury. Remanded for further proceedings not inconsistent with this opinion. REVERSED.

Argued 31 January, decided 27 March, 1905.

STATE ex rel. v. GUTRIDGE.

80 Pac. 98.

FINDINGS AND CONCLUSIONS NOT A JUDGMENT.

1. Under Section 158, B. & C. Comp., requiring that on the trial of an issue of fact by the court, its decision shall be given in writing, stating the facts found and conclusions of law separately, and that they be entered in the journal, and judgment rendered in accordance therewith, the judgment is another order following the entry of the findings, and neither is the equivalent of the other.

SUPPLEMENTARY PROCEEDINGS—SUFFICIENCY OF FINDINGS TO SUPPORT JUDGMENT—CONTEMPT.

2. The presumption declared by B. & C. Comp. § 788, subd. 33, that conditions shown to exist continue as long as such conditions usually do, does not apply to the possession of money shown to have been on hand two years before. For example, a conclusion in March, 1904, that a judgment debtor has on hand enough money to satisfy a judgment of \$600 and costs, is not supported by findings that in May, 1902, he received \$2,000, that since then he had steadily earned three dollars per day; that he had no family except his wife, who during this time had been keeping boarders for pay; and that no satisfactory explanation had been made of what had been done with the \$2,000.

From Grant: **MORTON D. CLIFFORD**, Judge.

Statement by **MR. CHIEF JUSTICE WOLVERTON**.

This is a proceeding supplementary to execution by the State on the relation of Grant Thornburg against G. H. Gutridge, and comes here on an appeal by the defendant from a judgment of the circuit court, adjudging him to be in contempt of court, to pay a fine of \$25, and that he be imprisoned until he satisfies a certain other judgment previously rendered against him, and in favor of the relator, for the sum of \$660.50 and costs. The contempt consists in his alleged disobedience of a supposed order or judgment rendered in a proceeding supplementary to execution, requiring him, within 15 days after its entry, to pay the relator's judgment by the application thereto of money which was found in the proceeding to be in his possession. The affidavit upon which the contempt proceeding is based shows, in substance, that on November 22, 1902, Thornburg obtained a judgment against the defendant for the sum of \$660.50 and costs; that an execution was duly issued thereon, and returned nulla bona; that the judgment remains in full force and wholly unsatisfied; that by order of the court, made March 2, 1903, in a proceeding supplemental to execution, a referee was appointed to take and report the testimony therein; that thereafter, on May 20, 1903, the said referee made his report, and that from the testimony, pleadings, and rec-

ords in the cause the court found that defendant had in his possession in money \$2,000, of which he was the owner, and, as a conclusion of law, that the defendant be required to pay said \$2,000, or so much thereof as might be necessary to satisfy said judgment, within 15 days from the entry of judgment therein, which judgment and report were made a part of the affidavit; that said findings of fact, conclusion of law, judgment, and order were made and entered on the 4th day of March, 1904, of which defendant had personal knowledge, having been served with the same on April 8, 1904; and that defendant has no other property out of which the judgment may be made by levy of execution. The findings of the court to which reference is made in the affidavit, and which are a part thereof, are as follows:

"That on or about May —, 1902, the defendant sold to the Red Boy Mining & Milling Co. a piece of real property located in Grant County, Oregon, and received from C. A. Johns, the attorney for said Red Boy Mining & Milling Co., in cash and drafts, the agreed price thereof, which was and is \$2,000; that immediately thereafter said defendant, who is by occupation a miner, has worked at his occupation as a miner, receiving therefor on an average of not less than three dollars a day; that defendant's family consists of a wife and no children, and that during the time the defendant has been working at different mines and receiving good wages therefor, his wife has been keeping boarders and receiving pay therefor, and assisted in making the defendant a living; that no satisfactory explanation has been made as to what has been done with said \$2,000, or the wages received by the defendant for his labor, and which he has earned since May —, 1902. I therefore find that the defendant, G. H. Gutridge, at this time is the owner of and in possession of \$2,000 in money in Grant County, Oregon, which said money is liable to the execution upon the judgment herein.

"As conclusions of law, I find that the defendant, G. H. Gutridge, be required to pay said \$2,000, or as much thereof as may be necessary to satisfy the said judgment, and costs and disbursements taxed at \$149.30, within 15 days from the entry of judgment herein.

"Morton D. Clifford, Circuit Judge."

To this affidavit a motion to dismiss was interposed, on the ground, among others, that it does not state facts sufficient upon which to base contempt proceedings, which being overruled,

defendant answered, setting up again the prior proceedings upon which the present are based, and, issues being fully tendered, the court rendered judgment as first herein indicated.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. A. D. Leedy*.

For respondent there was a brief and an oral argument by *Mr. Patrick J. Bannon*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The cardinal and essential question presented by this record is whether there was ever any order or judgment rendered by the circuit court, in the proceedings supplemental to execution, directing or requiring the defendant to apply sufficient of the \$2,000 found to be in his possession in payment of the Thornburg judgment to satisfy it. If there was no such order or judgment made or rendered, it is self-evident that there could be no contempt for disobeying it. The alleged judgment having been made a part of the affidavit, we are thus enabled to determine from the record whether it is such as is claimed for it. The question was raised by the motion, and was not waived by the answer, which presents it again, because it goes to the want of facts sufficient upon which to base the proceeding.

1. It is perfectly clear that the matters of record relied upon as constituting a final order or judgment in the cause are not such, either in legal effect, or by intendment of the court or judge. They consist of the findings of the court merely, which were not followed by any order affecting a substantial right of the defendant in the proceeding. After reciting certain facts, as will be seen, the court proceeds:

"I therefore find that the defendant, G. H. Gutridge, at this time is the owner of and in possession of \$2,000."

This further appears:

"As conclusions of law I find that the defendant, G. H. Gutridge, be required to pay said \$2,000, or as much thereof as may be necessary to satisfy the said judgment, and costs and disbursements taxed at \$149.30, within 15 days from the entry of judgment herein."

The first was perhaps intended as a finding of fact, but, be that what it may, the last was evidently designed as a conclusion of law. It is so styled, and the purpose manifestly was that it should be followed by a final order or judgment, the conclusion being that Gutridge be required to make the designated application of the money within 15 days "after entry of judgment herein," not after the entry of "this judgment," as would most likely have been the case if it had been thought that the conclusion was in reality a judgment or order of the court. The statute requires that, upon the trial of an issue of fact by the court, its decision shall be given in writing, which shall state the facts found and the conclusions of law separately. These, again, are required to be entered in the journal, and judgment is rendered thereon and in accordance therewith: B. & C. Comp. § 158. This statute has generally been followed in practice, and there is but little doubt that the trial court intended that its findings should be followed by an order or judgment directing that the money which it found to be in the possession of the defendant should be applied in payment of the Thornburg judgment against defendant, but for some reason it was not done, and none, so far as the record shows, was ever made or entered. We conclude, therefore, that the affidavit is insufficient to support the contempt proceeding.

2. There is another reason back of this one, going to the utter disparagement of the affidavit. The finding that Gutridge was in possession of \$2,000 at the time it was made is not deducible from the findings of fact upon which it is based. It should be premised that the court made its findings nearly 10 months after the referee reported the testimony, which was more than a year after he was appointed to take it. The result, with the deductions, are, in brief, that in May, 1902, defendant sold a piece of real property, and was paid \$2,000 therefor; that he has since been receiving three dollars a day; that he has a wife, but no children; that his wife has been keeping boarders for pay, while he has been working; and that no satisfactory explanation has been made as to what has been done with the said \$2,000 and the wages received; ergo, that he had the \$2,000 in his pos-

session at that time—that is, when the findings were rendered. In the case of *Hammer v. Downing*, 41 Or. 234 (66 Pac. 916), the disputable presumption that a thing once proved to exist continues as long as is usual with things of that nature* was invoked in aid of the finding that the defendant still had in his possession a sum of money that he was shown to have had three months previous, and it was held to be unavailable. If unavailable there, how much less would be its utility in support of the finding here; so that, had there been a final order following the findings—that is, a judgment or order based thereon—it would not have supported the proceeding for contempt, and such is the doctrine of *Hammer v. Downing*.

Based on these considerations, the judgment of the circuit court will be reversed, and the cause remanded with directions to dismiss the proceeding and discharge the defendant.

REVERSED.

*B. & C. Comp. § 788, subd. 33.

Argued 24 January, decided 27 March, 1905.

SCHWARZ v. LEE GON.

80 Pac. 110.

BIAS OF JUROR.

1. In an action by a hop merchant against a farmer, a juror who stated that he did not know either of the parties and knew nothing about the case; that it would be hard to say whether in such a litigation he had any sympathy for one as against the other, but that he guessed he was in sympathy with the farmer, because he had had more dealings with farmers; but was quite certain that his verdict would depend on the evidence, is not subject to challenge for actual bias.

PAROL EVIDENCE TO VARY WRITTEN CONTRACT.

2. The rule against varying the terms of a writing by parol evidence is not applicable where the existence of the memorandum is denied, and the evidence is offered to explain what the writing really is.

REPLEVIN FOR UNDIVIDED INTEREST IN A MASS.*

3. Replevin will not lie for an undivided part of a mass of uneven quality, as, for an interest in a number of bales of hops varying in weight and grade.

From Marion: GEORGE H. BURNETT, Judge.

Action by Moritz Schwarz and others, partners, against Lee Gon and another, in which defendants had a judgment, from which plaintiffs appeal.

AFFIRMED.

*NOTE.—See 60 Cent. Law Jour. 4, for an article, The Sale of Part of a Mass.
REPORTER.

For appellants there was a brief over the name of *Carson, Adams & Cannon*, with an oral argument by *Mr. A. M. Cannon*.

For respondents there was a brief and an oral argument by *Mr. Grant Corby* and *Mr. George G. Bingham*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an action to recover possession of 86 bales of hops. The defendants had a verdict and judgment in the court below, and the plaintiffs appeal, assigning as error the overruling of their challenge for cause to the juror Graber, the admission of testimony, in the giving and refusal of certain instructions.

1. The juror Graber testified, in substance, on his voir dire, that he did not know either of the parties to the litigation, knew nothing about the case, and had no opinion as to the merits; that he did not know where his sympathies would be as between a hop merchant and a farmer; that it was pretty hard to say whether he had any sympathy for one as against the other; that he had never had anything to do with hops, but had dealt with farmers a good deal; that he could not say whether in a litigation between a hop merchant and a farmer he would have any sympathy for one or the other, but that he guessed that he was in sympathy with the farmer; that he had no prejudice in favor of one or the other; that he would favor the farmer more than the hop merchant because he had had more dealings with farmers, but that his feelings would not in any way affect his verdict on the trial; that he did not know exactly why he should state that he would favor the farmer more than the hop merchant; and that the fact that one of the litigants was a hop merchant and the other a farmer would not in any way affect his verdict, which would depend alone on the evidence. Although the juror did not express himself with absolute clearness, it is apparent that he had no actual bias against the plaintiffs. It appears that he knew nothing about the facts in dispute, did not know either of the parties, had no opinion as to the merits, and that the fact that one was a farmer and the other a hop merchant would not in any way affect his verdict, although he was friendly disposed towards farmers, because he had had more dealings with them than with hop merchants. Under these facts it was not

error to overrule the challenge for cause. This court has so often had occasion to examine the question of the competency of jurors and the rule which should apply in such cases, and the decisions are so full on the subject, that it is unnecessary to do more at this time than refer to them. See *State v. McDaniel*, 39 Or. 161, 168 (65 Pac. 520), where the authorities are collated.

2. Both parties claim title to the hops in controversy from the same source. The plaintiffs' evidence tended to show that on December 2, 1903, their agent, Harris, contracted to purchase the hops of a Chinaman named Lee Gon, who executed and delivered to Harris at the time a written memorandum stating, in substance, that in consideration of one dollar, the receipt of which was acknowledged, he sold to the plaintiffs 129 bales of hops, to be delivered free on board the cars at Hubbard, subject to inspection and acceptance; that the bales were to be in good merchantable order, weighing from 185 to 205 pounds each, and the purchase was made severable as to bales, the plaintiffs to inspect and receive the hops within 10 days from date; that upon the execution of the memorandum Harris offered Lee Gon a dollar as mentioned therein, but he declined to accept it, saying that he did not need the money, but demanded that Harris should return on the next day, and inspect and accept the hops; that a Chinaman named Ah Chop was present at the time the written memorandum was signed, and was requested by Harris to sign it, but declined to do so, saying that Lee Gon's signature was sufficient; that on the following day Harris returned to the place where the hops were stored, inspected and branded them, and they were delivered to him by Ah Chop; that Lee Gon was not present at the time of the inspection and delivery; that Harris was ready at that time to pay for the hops, and subsequently made a tender of the amount due thereon.

For the defendants, the evidence tended to show that Lee Gon and Ah Chop were each the owner of an undivided interest in the hops in controversy; that the written memorandum relied on by plaintiffs was signed by Lee Gon during negotiations between himself and Harris for the purchase and sale of the hops;

that it was understood, as a part of these negotiations, that Harris should pay \$200 down, and the written memorandum was signed with that understanding; that, when Harris offered Lee Gon but one dollar, he refused to accept it, declared the negotiation off, and refused to deal with or sell the hops to him, but told him he would sell them to another, which he subsequently did.

Objection was made by the plaintiffs to the admission of all oral testimony concerning the \$200 and the negotiations between Lee Gon and Harris prior to the signing of the written memorandum, on the ground that it tended to vary or contradict a written contract. The rule is unquestioned that parol evidence is not admissible to vary or contradict a writing, but such rule was not violated in this case. The defendants denied that the written memorandum introduced by the plaintiffs was ever executed or delivered by Lee Gon to take effect as a contract, but that it was signed by him during and as a part of negotiations between him and Harris for the sale of the hops, which negotiations were never consummated. The evidence offered and admitted was for the purpose of supporting this contention, and was competent.

The plaintiffs requested the court to give some 15 separate instructions, all of which were refused in the form requested, except No. 9. It is unnecessary for us to notice these instructions in detail. It is sufficient that we have examined them, and are satisfied that no error was committed in refusing to give them as requested.

3. Several exceptions were reserved to the charge of the court, but the only one urged at the argument was to the instruction that if the hops in controversy belonged to Lee Gon and Ah Chop in undivided parts, and the plaintiffs had succeeded to the title or interest of Lee Gon alone, they could not recover in this action. The general rule is undisputed that replevin will not lie for the recovery of an undivided part of personal property: *Guille v. Wong Fook*, 13 Or. 577 (11 Pac. 277); *Phipps v. Taylor*, 15 Or. 484, 488 (16 Pac. 171); *Sharp v. Johnson*, 38 Or. 246 (63 Pac. 485, 84 Am. St. Rep. 788). An exception is made, however, by some authorities where the property sought to be replevied con-

sists of a part of a larger mass of the same nature and quality, which can be easily divided into aliquot parts, such as cereal grains and the like: 2 Cobbey, Replevin (2 ed.), § 400. But this rule can have no application to an action, like the case at bar, to recover an undivided interest in a certain number of bales of hops, which, as the evidence shows, not only vary in weight, but are not necessarily of uniform quality or grade. The written memorandum offered by the plaintiffs states that the hops were in bales weighing from 185 to 205 pounds each, and that the purchase was made severable as to bales, thus plainly implying that the hops might not be of the same grade or quality. The plaintiffs' interest, therefore, if less than the entire amount, could not be separated from that of their co-tenant without injury or loss to one party or the other, and replevin will not lie. The judgment is affirmed.

AFFIRMED.

Argued March 7, decided April 24, 1905.

BRIX v. CLATSOP COUNTY.

80 Pac. 650.

COUNTIES—CONTRACT CREATING A DEBT.

A contract by a county for the construction of a court house by which the county agrees to issue warrants to the contractors to the amount of the contract price, payable only out of a fund to be created by levying a special tax for a series of years, creates a debt against the county, within the meaning of Const. Or. Art. XI, § 10, limiting the power of counties to "create any debts or liabilities" exceeding a stated amount.

From Clatsop: THOMAS A. McBRIDE, Judge.

Suit by Asmus Brix and others against Clatsop County and others to restrain the drawing and delivering of certain county warrants, and to obtain the cancellation of a contract made by the county for the construction of a court house. A demurrer to the complaint was sustained pro forma, and plaintiffs appeal.

REVERSED.

For appellants there was a brief over the name of *Noland & Smith*, with an oral argument by *Mr. George Noland*.

For respondents there was an oral argument by *Mr. Harrison Allen*, District Attorney, *Mr. Charles H. Carey* and *Mr. George Clyde Fulton*, with a brief to this effect.

The gravity and great importance of the principle involved in this case, not alone to the people of Clatsop County, but to the people of the State of Oregon, cannot be too earnestly and carefully considered. Whether or not the county of Clatsop shall or not build for itself a court house may be of great importance to its inhabitants, yet whether it succeeds or fails, sinks into utter insignificance when compared with the great principle involved in this appeal. For whether this court shall follow those courts which have adopted what is known as the rule of liberal construction, or those courts which have heretofore and still cling to the doctrine of strict construction, the decision of this court upon the controlling principle involved in this suit will either stay to an immeasurable extent the great commercial interests of our state, and practically prohibit the construction of public buildings, public improvements, public parks, and the beautifying of public grounds, for many years to come, or will point out to our enterprising citizens a legitimate, prudent and practical manner of providing the present inhabitants with substantial public buildings, parks and improvements, without violating the provisions of our constitution, which is being done every day. This court, as now organized, has been forced to say to honest contractors who have in good faith furnished materials and performed labor, and built large and beautiful structures, for municipal corporations in this state, at an expenditure of many thousands of dollars, that, although the municipalities received the benefit of such labor and materials, yet because they could not lawfully create debts, the contractors must suffer the loss alone; but, to the credit of this court, in each instance where it has been compelled to perform this painful duty, it has pointed out a safe, practical and legal method whereby public improvements may be built regardless of cost, namely, by levying a special tax and providing a special fund into which all collections of such special levy shall be deposited for the purpose of paying for such improvement: 33 Or. 358, 43 Or. 476.

We realize that by a certain school of jurists, because of the peculiar construction of their minds, or by reason of their associates and early teachings, the contrary doctrine is held, and that

courts dominated by strict constructionists deny the doctrine which we urge in his case. Yet we submit, in all due respect to the honesty, ability and patriotism of these jurists, that the coming century will have seen the last of the adherents to these pernicious doctrines. And it should be so when it is remembered that the very existence of this government is due solely to the great doctrine of liberal construction advanced by Webster, John Marshall, Bushrod Washington, Story and their followers. Had the doctrine of strict construction been adhered to, the history of this great nation would have been closed at the rendition of the decision in the Dartmouth College case.

The constitution of this state, as well as that of the United States, keeps step with the wheels of progress, it expands as the great and growing industries of the nation expand. Were it possible for the framers of the Constitution of the United States to reassemble in this year, Anno Domini, 1905, they would be aghast at the construction placed upon it by John Marshall and his followers. Yet the history of this nation amply vindicates the doctrines of this great school. The question of internal improvements in this state is one of the utmost importance. Modern and sightly structures are desirable for many reasons, not only on account of the beauty of the architecture, their convenience and safety, but because such structures add stability to the communities where located, and are incentives to our citizens to build better and more substantial structures. The plan adopted by the act in question meets with the approval of an overwhelming weight of all authorities, and practically the unanimous approval of all modern authorities.

I. We submit with great confidence that by the execution of the contract set forth in plaintiff's complaint between Clatsop County and Hastie & Dugan to build the court house in question, and the building thereof under such contract, and the issuance and delivery of the warrants provided for therein, no debt is created within the inhibition of the state constitution: *Eaton v. Mimnaugh*, 43 Or. 465 (73 Pac. 754); *Brockway v. Roseburg*, 46 Or. 77 (79 Pac. 335); *Grant v. Davenport*, 36 Iowa, 396; *Burlington Waterworks v. Woodward*, 49 Iowa, 58; *Creston Water-*

works v. Creston, 101 Iowa, 687 (70 N. W. 739); *Witter v. Board of Supervisors*, 112 Iowa, 380 (83 N. W. 1041); *Swanson v. City of Ottumwa*, 118 Iowa, 161 (91 N. W. 1048, 59 L. R. A. 620); *State ex rel. v. Mayor*, 19 Mont. 518 (49 Pac. 15); *City of Galveston v. Heald*, 54 Tex. 420; *Weston v. City of Syracuse*, 17 N. Y. 110; *Strieb v. Cox*, 111 Ind. 299 (12 N. E. 481); *Board v. Hill*, 115 Ind. 316 (16 N. E. 156); *Quill v. Indianapolis*, 124 Ind. 292 (7 L. R. A. 681, 23 N. E. 738); *City of Albany v. McCullouch*, 127 Ind. 500, 505 (26 N. E. 1076); *City of La Porte v. Gamewell F. Tel. Co.* 146 Ind. 466 (45 N. E. 588, 58 Am. St. Rep. 359, 35 L. R. A. 686); *Board of Commissioners v. Harrell*, 147 Ind. 500 (46 N. E. 124); *Smilie v. Fresno County*, 112 Cal. 311 (44 Pac. 356); *People ex rel. v. May*, 9 Colo. 404 (12 Pac. 838); *Hockaday v. County Com'rs.* 1 Colo. App. 362 (29 Pac. 287).

II. The entire act forms a part of the contract to erect and complete the court house building. The conclusion therefore can not be escaped that one so contracting is bound by its terms, and can have no claim against the county on a warrant issued against such fund until a sufficient sum of money shall be paid into it, which, computing the warrants in the order issued, shall be sufficient to satisfy such warrant, and, should the tax be insufficient to pay any such warrant, the holder can have no action against the county, but is utterly remediless in the premises: Const. Or. Art. IX, § 3; *Northup v. Hoyt*, 31 Or. 524 (49 Pac. 754); *Cook v. Putman*, 70 Mo. 668; *Moody v. Cass County*, 85 Mo. 479; *Mitchell v. Spears*, 39 Ga. 56; *Hospital v. Higgins*, 15 Ill. 185; *Hornthall v. Commissioners*, 126 N. C. 26 (35 S. E. 191); *City of La Porte v. Gamewell Fire Alarm Tel. Co.* 146 Ind. 466 (58 Am. St. Rep. 359, 35 L. R. A. 686, 45 N. E. 588).

III. The act in question provides that the proceeds of the tax collected, levied by virtue thereof, shall be devoted exclusively to the erection, completion and furnishing of a court house. This is a legislative appropriation of the funds created thereby: *Hockaday v. Commissioners*, 1 Colo. App. 362 (29 Pac. 287). In any event the levy of the tax would itself be an appropriation: *Durith v. Buxton*, 63 Ark. 397 (39 S. W. 56).

IV. Whatever doubts may have existed in the past, it is now the rule, recognized by all courts, that a county or municipal corporation, even though indebted to its constitutional limit, may make valid appropriations of its revenue in anticipation of the collection thereof, and that the power in regard to special taxes for special purposes is not confined to the current year, but to taxes to be collected from year to year through a series of years: *Municipal Sec. Co. v. Baker County*, 33 Or. 338, 347 (54 Pac. 174); *Eaton v. Mimnaugh*, 43 Or. 465 (73 Pac. 754); *City of Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 400; *Fuller v. Heath*, 89 Ill. 296; *Koppikus v. State*, 16 Cal. 253; *People v. Pacheco*, 27 Cal. 204; *Smilie v. Fresno County*, 112 Cal. 311 (44 Pac. 356); *Grant v. City of Davenport*, 36 Iowa, 396, 399; *Witter v. Board*, 112 Iowa, 380 (83 N. W. 1041); *Swanson v. Ottumwa*, 118 Iowa, 161 (91 N. W. 1048, 59 L. R. A. 620); *People ex rel. v. May*, 9 Colo. 404 (12 Pac. 838).

MR. JUSTICE BEAN delivered the opinion of the court.

In June and October, 1904, Clatsop County made contracts with the defendants Hastie & Dugan, to furnish the materials and labor necessary for the construction, according to certain plans and specifications, of a court house for \$116,200.30. After a part of the work had been performed, the contractors refused to proceed further because of a doubt as to the validity of their contract, due to the fact that the county was in debt at the time it was made in excess of the constitutional limit. At the recent session of the legislature an act was passed (Laws 1905, chap. 6, p. 64,) authorizing the levy of a special tax upon all the taxable property of the county, to be continued through a series of years, for the purpose of "purchasing, erecting, building and furnishing a court house." Section 1 of this act provides that the county court, at its January term, 1905, shall levy a tax of not to exceed five mills on the dollar on all the taxable property in the county, to continue through a series of years to be determined by the court, for the purpose of constructing a court house; that the order of the court shall specify the amount of the levy, the number of years the tax is to run, and the purpose for which it is levied, and thereafter without further order, the levy shall be held good and

valid, and shall be extended on the assessment roll and collected in the same manner that all other taxes are extended and collected, each and every year thereafter, until the full series of years designated shall have expired; that the money arising therefrom shall be kept separate and apart from other funds, and be known as the "Court House Fund." By section 2 the county court is authorized to purchase from the former contractors and the architect their interests in the building designed as a court house, and pay therefor, in warrants on the fund to be derived from the special tax, an amount equal to the warrants theretofore issued to them on account of such building, and to contract for the completion and furnishing of the partially constructed building so purchased in accordance with the plans and specifications already adopted or such as might thereafter be approved by the court, but payment thereof should be made only in warrants on the special fund. Section 3 requires the county court to recall and cancel all outstanding warrants theretofore issued on account of the construction of the building. Section 4 declares that the contract for the completion and furnishing of the building shall provide that payment therefor shall be made only with money to be collected and placed in the special court house fund, and that no part of the contract price shall be held to be an indebtedness against the county or become due or payable until sufficient money shall be collected by the special tax to pay the warrants drawn against the same, and that the act authorizing the levy and the making of the contract shall be a part of such contract. Section 5 provides that no warrants shall be drawn on such special fund except by order of the county court for the construction, completion or furnishing of the court house, and that such warrants shall not be paid from any other fund and no money from any other source shall ever be transferred to such fund. Section 6 requires the county treasurer to keep the money received on the special tax separate and apart from other funds, and to pay it out only on warrants issued by the county court on account of the construction of the court house. Section 7 declares that no part of the purchase price of the interests of the former contractors or architect in the uncompleted building, or any part

of the contract price for the completion or furnishing of the court house, shall be held to be an indebtedness against the county.

The act contained an emergency clause and was filed in the office of the Secretary of State January 27, 1905. Immediately thereafter the county court, in pursuance of the authority thus attempted to be conferred upon it, made an order levying a special tax of five mills on the dollar on all the taxable property in the county, to continue through a series of 15 years, commencing with the year 1905 and ending with the year 1919, for the purpose of purchasing, erecting, building and furnishing a court house. It also purchased of the contractors and architect their interests in the uncompleted building, and entered into a contract with the defendants Hastie & Dugan for the completion thereof for the sum of \$103,800.30, to be paid only in warrants on the special fund arising from such tax. It was stipulated in the contract that the warrants issued in payment for the building should be accepted in full satisfaction of any and all claims against the county arising out of the contract, and that they would look solely to the special fund for the payment thereof. At the time the tax was levied and the contract made, the county was in debt more than \$70,000 over and above the amount permitted by the constitution, and it is claimed and alleged by the plaintiffs that by reason of such fact the contract was and is void.

The constitution provides that no county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of \$5,000, except to suppress insurrection or repel invasion: Const. Or. Art. XI, § 10. A debt or liability incurred for the construction of a court house is within the provision of the constitution, and, if incurred in violation thereof, is void: *Eaton v. Mimnaugh*, 43 Or. 465 (73 Pac. 754). If, therefore, the contract in question created a debt or liability against the county, it is void. That the act of 1905 authorizing the levy of the special tax and the making of the contract for the construction of the court house was designed and intended to enable the county to avoid the provisions of the constitution is apparent. The position of the defendants is that such a result was successfully accom-

plished, and no debt or liability was created against the county by the contract for the construction of the court house, because a special tax to continue for 15 years, to provide a fund for the payment of the contract price, was levied prior to the making of the contract, and such contract contained a stipulation that the cost of the building should be paid only from such special fund.

There are decisions of able and respectable courts holding that when, at the time a contract presently to become due, is made by a county or a municipality, a fund is on hand and appropriated to its payment, or a fund such as current taxes has been provided, but is uncollected, or an appropriation is made of the future income of a revenue producing property belonging to the municipality, such as waterworks and the like, and the contract is expressly made payable only out of such funds or revenue, with no recourse on the municipality, it does not create a debt or liability against the corporation, within the meaning of constitutional or charter limitations similar to those contained in our constitution: *People ex rel. v. May*, 9 Colo. 404 (12 Pac. 838); *City of Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385; *Fuller v. Heath*, 89 Ill. 296; *Winston v. Spokane*, 12 Wash. 524 (41 Pac. 888); *Faulkner v. Seattle*, 19 Wash. 320 (53 Pac. 365); *Dively v. City of Cedar Falls*, 27 Iowa, 227; *Grant v. City of Davenport*, 36 Iowa, 396; *Doon Township v. Cummins*, 142 U. S. 366 (12 Sup. Ct. 220, 35 L. Ed. 1044). This doctrine rests upon the theory (to use the language of one of the decisions cited) that the contract amounts, in effect, to "an assignment pro tanto, without recourse, by the county of the fund," or (to use that of another) "one thing is simply given and accepted in exchange for another." In such case the transaction is deemed closed on the part of the municipality when the warrant or order on the special fund is issued and accepted, thereby leaving no further liability or obligation, either absolute or contingent, against it, whereby its debt may be increased. But to have this effect, it seems obvious to us, there must be at the time the contract is made a fund belonging to the municipality, having either an actual or a potential exist-

ence, concerning which the parties may contract. Otherwise there is nothing to assign or exchange. The assessment and collection of a tax on the property of the inhabitants of a municipality in the future, for the benefit of a particular individual, and in payment of an obligation incurred by the municipal authorities, necessarily, it seems to us, implies a debt or liability against the municipality which the holder is entitled to have paid with money derived from taxation. The constitution plainly prohibits a county from contracting debts or liabilities which singly or in the aggregate shall exceed \$5,000, except for a specific purpose. A contract by it to pay a certain sum of money in the future, with interest, out of money to be thereafter raised by general taxation from all the people, whether the levy be made at one time, covering that future, or has to be made yearly, is manifestly a debt or liability against the municipality; and no technical process of reasoning, legal acumen, or jugglery of words can make the fact otherwise. The moment an obligation to pay money is voluntarily incurred by a municipality with no funds or assets in its treasury, nor current funds or revenue collected or in process of collection, for the payment of the same, that moment such obligation must be considered in determining its indebtedness, however carefully the law or the contract under or by which it was incurred may attempt to shift the burden from the corporate entity to the taxpayers. To hold otherwise would be to make an unwarranted distinction between the taxpayers in their organized capacity and the same persons as individuals. In the payment of obligations incurred by the officers of a municipal corporation from money raised by taxation, there is no room for a distinction between the corporation itself and the taxpayers. The money must come from the taxpayers, whatever may be the language of the law authorizing its exaction, or of the contract providing for its payment, and the constitution cannot be avoided by providing a special tax to be levied in advance for a series of years, and making such contract payable alone therefrom: *Hodges v. Crowley*, 186 Ill. 305 (57 N. E. 889).

Stripped of all subterfuge, the act of the legislature authorizing the defendant county to levy a special tax for court house purposes, and the contract made by it in pursuance thereof, are an attempt to permit the county, although already in debt largely beyond the constitutional limit, to impose an additional indebtedness of over \$100,000 upon its taxpayers, by attempting to make a distinction between the county as a corporate entity and the individual taxpayers. If this may be done for the construction of a court house, it may be done for highways, bridges, poor farms, hospitals, jails, and the like corporate expenses, and the property of the taxpayers may thus be burdened for years to come, contrary to the provisions and spirit of the constitution. It would not be particularly comforting to a taxpayer so situated to be told, while groaning under such special levies, extending hopelessly into the future, that he could congratulate himself that he lived in a county which was not indebted more than \$5,000. The reasoning which results in such a conclusion is to us unsound. The constitution was intended to protect the taxpayers. Its language is plain and unambiguous, and the court is not justified in giving it a strained or astute interpretation to avoid individual or local hardship. It is its duty to enforce the provisions as written, according to their plain and obvious meaning, and not to permit it to be circumvented by shifting the burden of a debt from the municipal entity to the taxpayers. *Swanson v. City of Ottumwa*, 118 Iowa, 161 (91 N. W. 1048, 59 L. R. A. 620), is contrary to this view; but the question decided in that case arose about the same time in a case pending in the circuit court of appeals, and was there decided adversely to that of the Iowa court: *Ottumwa v. City Water Co.* 119 Fed. 315 (56 C. C. A. 219, 59 L. R. A. 604). The opinion in the latter case, written by Judge LOCHREN, was concurred in by Judges SANBORN and THAYER, and is a clear, able and convincing decision, and seems to us a more logical, reasonable, and safe one than that of the Iowa court.

The decree of the court below is therefore reversed, and one will be entered here as prayed for in the complaint.

REVERSED.

Argued 28 June, decided 18 July, 1904, rehearing denied 3 January, 1905.

MORGAN'S ESTATE.

77 Pac. 608, 78 Pac. 1029.

JURISDICTION OF COUNTY COURTS IN PROBATE MATTERS.

1. Under Const. Or. Art. VII, §12, conferring on county courts "the jurisdiction pertaining to probate courts, * * and such civil jurisdiction as may be provided by statute not exceeding five hundred dollars," the county courts of this State are not limited in the examination and allowance of claims against estates to claims of that amount, when proceeding under Section 1161, B. & C. Comp.

EXECUTORS—CONSIDERATION BY COUNTY COURT OF REJECTED CLAIM.

2. Section 1161, B. & C. Comp., is intended to afford a speedy and efficient means of determining the justness of claims against estates after their disallowance by the personal representatives, without the technical pleadings necessary in courts of law, and the proceedings should be equitable rather than legal.

EFFECT OF EVIDENCE.

3. The evidence in the case sustains the finding that the promissory notes constituting the claim in question were the obligations of the firm of Morgan & Stowell, and of each member thereof.

EXECUTORS—LIMITATIONS—RIGHT TO SUE ON REJECTED CLAIM.

4. A claim against an estate not being suable for six months from the appointment of a personal representative (B. & C. Comp. §387), and not thereafter until it has been rejected, or a reasonable time allowed for so doing (B. & C. Comp. §388), the statute of limitations is suspended during the time that a claim filed for allowance is being held without being rejected or allowed, and remains suspended until the personal representative acts on the claim.

EXECUTORS—CONSTITUTION—PROBATE JURISDICTION OF COUNTY COURTS.

5. Since the adoption of the Constitution of Oregon, Section 12 of Art. VII of which confers on county courts the "jurisdiction pertaining to probate courts," those courts have had jurisdiction to pass upon the validity of claims presented to but disallowed by executors or administrators. When the constitution was adopted the territorial courts were authorized by statute to settle such claims, and that authority was continued by the clause quoted.

JURISDICTION OF COUNTY COURT TO ADJUDICATE CLAIM PRESENTED BY ASSIGNEE OF ORIGINAL CLAIMANT.

6. Does the "claimant" mentioned in Section 1161, B. & C. Comp., which provides that after a claim has been presented to a personal representative and rejected "said claimant" may have an adjudication thereof by the county court, include an assignee of the claim who acquired his interest from the person who originally presented the claim after its presentation?

PRESENTING CLAIM—WAIVING MATTER IN ABATEMENT.

7. The objection that a claim against a decedent's estate was not presented by the proper person is a matter in abatement only, and is waived by joining issue on the merits.

CONSIDERATION OF EVIDENCE ON MOTION FOR NONSUIT.

8. As a motion for a nonsuit admits the truth of plaintiff's testimony, if there is any competent evidence tending to support the cause he is entitled to have it go to the jury.

From Multnomah: ARTHUR L. FRAZER, Judge.

Statement by MR. JUSTICE BEAN.

This proceeding was instituted in the county court, sitting for the transaction of probate business, to establish a claim against the estate of A. H. Morgan, deceased. Morgan and A. W. Stow-

ell formed a partnership in 1882, engaging in the retail grocery and feed business in the City of Portland, from time to time borrowing sundry moneys from the Commercial National Bank, the assignor of Wells, Fargo & Co. On or about October 1, 1888, they sold out their business, but did not dissolve their partnership, nor did the purchaser assume any of the liabilities of the firm, or the sale include its outstanding accounts or bills receivable. At the time of the sale Morgan & Stowell were indebted to the bank in the sum of \$2,500, evidenced by a promissory note for that amount, signed by the firm name. This note was renewed from time to time, Morgan signing the firm name to the renewal in some instances and Stowell in others, until December 24, 1891, when the last renewal note was given, the firm name being signed by Stowell. The interest on this note was paid to March 24, 1894. On May 1, 1889, Morgan & Stowell borrowed or became indebted to the bank in the sum of \$1,000, giving their promissory note therefor, which was likewise renewed from time to time until April 25, 1894, when the other note now in controversy was executed, the firm name being signed by Stowell. No payments have been made upon it. Morgan died March 3, 1897, and a few days thereafter his wife was appointed executrix of his estate. On April 22, 1897, the bank duly presented to the executrix for allowance a claim against the estate based on the two notes mentioned. The receipt of the claim was acknowledged by the attorney for the executrix, and the bank was assured that the claim would be "examined into and allowed or rejected in due course, of which you will be advised."

Mr. Morgan's estate consisted almost entirely of real property. The condition of the market was such at the time of his death that it was difficult to convert this real property into money, and the bank was indulgent, and did not press payment of its claim. Its officers, however, several times inquired of the attorney for the executrix about the matter, and were assured by him that the estate would ultimately pay all the claims against it, and leave something over, but were not advised that there was any doubt as to the validity of the claim or its allowance by the

executrix. Meanwhile, the Commercial National Bank sold and transferred its claim to Wells, Fargo & Co., which, in July, 1901, put it in the hands of its attorney for adjustment. Upon examining the records of the Morgan estate, the attorney found that the executrix had filed no list of claims presented as required by law, and had made no reports whatever of any of her transactions. He therefore inquired of her attorney concerning the condition of the estate, and was informed that the bank's claim had been rejected. This was the first knowledge either the bank or its assignee had of that fact. The notation of rejection on the claim bears no date, nor does the time thereof otherwise appear. Immediately on learning that the claim had been rejected, Wells, Fargo & Co. applied to the county court for its allowance under Section 1161, B. & C. Comp. The county court allowed the claim, but upon appeal to the circuit court a nonsuit was entered, and hence this appeal. REVERSED.

For appellant there was a brief over the name of *Platt & Platt*, with an oral argument by *Mr. Robert T. Platt*.

For respondent there was a brief over the names of *Ellis G. Hughes* and *Richard Williams*, with an oral argument by *Mr. Hughes*.

MR. JUSTICE BEAN delivered the opinion of the court.

There are three questions presented for our consideration: (1) Whether, under Section 1161, B. & C. Comp., the county court, sitting in the transaction of probate business, has jurisdiction to adjudicate and allow a claim for more than \$500 against an estate; (2) whether the notes upon which the claim of the bank is based were in fact the obligations of the partnership of Morgan & Stowell; and (3) whether they are barred by the statute of limitations.

1. The constitution provides: "The county court shall have the jurisdiction pertaining to probate courts, * * and such civil jurisdiction, not exceeding the amount of value of five hundred dollars, * * as may be prescribed by law": Const. Or. Art. VII, § 12. It is argued that the examination and allowance of a claim against an estate under Section 1161 is the exercise by the county

court of civil, as distinguished from probate, jurisdiction, being, therefore, limited to claims which do not exceed \$500. In our opinion, this view is erroneous. By the constitution county courts are vested with the jurisdiction pertaining to courts of probate, and the legislature is authorized to confer upon them limited civil and criminal jurisdiction. The two jurisdictions are, however, as separate and distinct as if conferred upon separate tribunals. While sitting in the transaction of probate business, the nature and jurisdiction of a county court must be sought in the general nature and jurisdiction of probate courts as they are known in the history of the English law and the jurisprudence of this country. The allowance or ordering the payment of claims against estates which are in process of administration has always been considered an appropriate subject for the jurisdiction of probate courts: 2 Woerner, Administration (2 ed.), § 391, et seq. In this country courts exercising such jurisdiction are often invested by statute with the power to hear and determine claims against the estates of deceased persons in a summary manner, without the formality of technical pleadings: 2 Woerner, Administration (2 ed.), § 391, et seq. Such is our statute. The subject-matter of Section 1161, B. & C. Comp., pertains exclusively to the administration of estates, and is clearly within the functions of a probate court.

2. The remedy there provided is not exclusive, but is intended to afford a speedy, efficient, and summary remedy to one who has a claim against an estate which has been rejected by the executor or administrator, without the necessity of technical pleadings or the observance of the formal proceedings required in an ordinary action: *Wilkes v. Cornelius*, 21 Or. 348 (28 Pac. 135); *Johnston v. Shofner*, 23 Or. 111 (31 Pac. 254); *Pruitt v. Muldrick*, 39 Or. 353 (65 Pac. 20). That the proceedings are to be regarded, for the purpose of trial, as an action at law, rather than a suit in equity (*Wilkes v. Cornelius*, 21 Or. 341, 23 Pac. 473), does not affect the question. From the nature of the case, the method of procedure usually provided for probate courts is more nearly conformable to proceedings in equity than in law. Such courts, however, do not have either original equitable or

common-law jurisdiction, and in the disposition of the business before them they observe and apply legal and equitable rules, as the case may require and the statute provide.

3. The second question is one of fact. There is sufficient evidence tending to show that the notes in question were the obligations of the firm of Morgan & Stowell to carry that question to the jury. Stowell testified that the consideration of the notes was money borrowed by the firm for the purpose of conducting its business and discharging its debts, and that the notes in question were given in renewal of previous obligations incurred with the knowledge, consent, and acquiescence of Morgan. Dooley, the assistant cashier of the bank, testified that he presented the particular notes in question to Morgan for payment, and Morgan said that he was unable to pay them at the time, but would take them up at some later date. The cash book of the firm of Morgan & Stowell, which was kept by Morgan, its entries being chiefly in his handwriting, shows the receipt of the consideration for the \$1,000 note, and also the firm's payment from time to time of interest on that sum and on the \$2,500 note. There was other evidence tending in the same direction, but this is sufficient for the present purpose.

4. The important and difficult question is whether this proceeding is barred by the statute of limitations. The \$1,000 note is dated April 25, 1894, and the last payment on the \$2,500 note was made March 24th of the same year. The proceeding was instituted in the county court on July 20, 1901, more than seven years thereafter, and is therefore barred unless the running of the statute of limitations was suspended from the time the plaintiff's claim was presented to the executrix until the bank was notified that it had been rejected. By Section 387, B. & C. Comp., an action cannot be maintained against an executor or administrator until the expiration of six months after the granting of letters testamentary or of administration, and by Section 388 such an action cannot be commenced until the claim of the plaintiff has been duly presented to the executor or administrator, and by him disallowed. Section 20, B. & C. Comp., provides that, when the commencement of an action is stayed by statutory

prohibition, the time of the continuance of such prohibition shall not be a part of the time limited for the commencement of the action. It seems, therefore, that the time a claimant is prohibited from commencing an action on his claim, either because the six months after the granting of letters testamentary or of administration have not expired or because the question of the allowance of the claim is pending before the executor and undecided, will not be deemed a part of the time limited for the commencement of the action thereon. During the first six months after the granting of letters one holding a claim against an estate, except possibly when it comes within the provisions of Section 18, is prohibited from suing thereon in any event; nor can he commence his action after the expiration of such time until the claim has been disallowed. He must, of course, present his claim before it is barred by the statute of limitations, otherwise the executor or administrator is not authorized to allow it: B. & C. Comp. § 1161. The statute cannot be tolled by a mere failure to present the claim. After it has been presented, however, the claimant is prohibited from suing thereon until it is disallowed, and the operation of the statute will be suspended during the time of such prohibition: *Blaskower v. Steel*, 23 Or. 106 (31 Pac. 253); *Nally v. McDonald*, 66 Cal. 530 (6 Pac. 390); 19 Am. & Eng. Enc. Law (2 ed.), 216.

The claim in this case was presented for allowance in April, 1897. It was not then barred by the statute of limitations. Until it was disallowed by the executrix, or until she had retained it a reasonable time without acting on it, no action could have been commenced by the claimant to recover thereon. During the time it was properly pending before the executrix, the cause of action was stayed by the statute, and therefore is not a part of the time limited by the general statute of limitations for the commencement of an action on the claim. An executor or administrator is entitled to a reasonable time after the presentation of a claim in which to examine it to ascertain whether he will allow or disallow it, but, unless he takes some action thereon within such time, the claimant, at his option, may treat the claim as disallowed, and act accordingly: *Goltra v. Penland*, 45 Or. 254 (77

Pac. 129). This right, however, is believed to be personal to the claimant, who may waive it, and permit the claim to remain in the hands of the executor for further consideration. If he does so, and it is afterwards rejected, the right to commence an action will date from the time of rejection, and not from the time the claimant might have elected to treat the claim as disallowed and commenced an action if he had so desired. The claim in suit was indorsed "disallowed," but the time when such indorsement was made is not stated. The notation is not dated, and there is no proof whatever on the subject. The statute provides that whenever a claim is disallowed by an executor or administrator he shall indorse thereon the words "Examined and rejected," with the date thereof, and sign the same officially (B. & C. Comp. § 1161), but whether, in such case, the claimant should be notified thereof, either personally or constructively, by the executor or administrator filing a proper report with the county court, as required by the statute, is not clear.

But however that may be, and whatever may be the rule in this regard in ordinary cases, we are of the opinion that under the facts of this particular case the executrix can not be permitted to insist that the claim was rejected by her prior to the time the bank or its assignee was advised of her action. When the claim was presented, the bank was advised in writing that it would be notified of the action of the executrix thereon as soon as had. Some seven or eight months later it was assured that the estate "would undoubtedly pay every dollar it owes," but it would be necessary to sell some of the real estate, which the executrix was endeavoring to do, but could not rush the matter without such a sacrifice as would be injurious not alone to the estate but to the creditors, and they were therefore requested, "in their own interests, to be patient." By these statements and promises and the conversations with the attorney of the estate the bank was lulled into security, and did not press the payment of its claim. Relying upon such promises and statements, and in view of the general condition of the estate, and its desire that the largest amount possible should be realized from the assets, it was indulgent, and the executrix ought not now be permitted to insist that its rights have been injuriously affected by some

secret action of hers in rejecting the claim. If it was to be rejected because not an obligation of the estate, the proper indorsement should have been made thereon, the bank advised by the return of the claim, or in some other manner, of the action of the executrix, so that it could have taken such steps as it might deem proper to protect its interests. This was not done, nor did the executrix file with the county court, as required by law, a report of the claims presented against the estate. On the contrary, the claim remained either in her possession or her attorney's, and it was not until the statute of limitations had run that the bank's assignee was advised that the claim had been rejected. We are of the opinion, therefore, that the time during which the claim was in the hands of the executrix for examination, without notifying the bank that it had been rejected, should not be taken as a part of the time limited by the statute for the commencement of the action thereon.

It follows that the judgment of the court below should be reversed, and it is so ordered.

REVERSED.

Decided 3 January, 1905.

ON MOTION FOR REHEARING.

MR. JUSTICE BEAN delivered the opinion of the court.

5. Counsel for the executrix has filed a petition for a rehearing, in which he discusses at great length and with singular learning and ability the jurisdiction of probate courts at common and civil law, for the purpose of showing that the court was mistaken in holding that at the time of the adoption of our constitution such courts had power and jurisdiction to hear and determine the validity of claims against an estate or a decedent which had been presented to and disallowed by an executor or administrator. The question is an interesting one, but it is not necessary to follow counsel in his examination of it to ascertain whether his conclusions are justified from an historical standpoint, or whether the court was in error in saying in the former opinion that the allowance or rejection of claims against estates in process of administration has always been considered a proper subject of probate jurisdiction. He admits in his petition that

the county court, sitting in probate, has, under the constitution, "full probate jurisdiction as it existed at the time the constitution was adopted." At the time of the adoption of the constitution the statute of the territory provided that claims against an estate should be presented to the administrator or executor for allowance, and, if rejected by him, the holder should bring a suit in the "proper court" against the executor or administrator within a specified time, or the claim should be barred (Laws, 1854-55, p. 357); and that the judge of probate should have and possess full powers and "original jurisdiction in all cases relating to the probate of wills," etc., "the hearing and determining of suits and other proceedings instituted against executors and administrators upon any demand against the estate of their testator or intestate": Laws, 1854-55, p. 339. This statute is important in ascertaining the meaning of the phrase, "jurisdiction pertaining to probate courts," as used in Section 12, Art. VII, of the Constitution of Oregon, defining the jurisdiction of county courts, as it was used in that instrument in the sense in which it was generally understood and accepted at the time: *Adam v. Lewis*, 5 Sawy. 229 (1 Fed. Cas. 132). The statute was continued in force by Section 7 of Art. XVIII, of the Constitution of the State, until the law was changed in 1862: *Wright v. Young*, 6 Or. 87. At the time the constitution was adopted, therefore, the probate court had jurisdiction to hear and determine claims against an estate which had been presented to and rejected by the administrator. As a contrary position forms the basis of counsel's argument, the question need not be further pursued.

6. The next point made is first raised in the petition for the rehearing. It is that the county court was without jurisdiction, because the claim was not presented to it by the original claimant, but by an assignee, acquiring title after the claim had been presented to the executor for allowance. Section 1161, B. & C. Comp., provides, among other things: "If any executor or administrator shall refuse to allow any claim or demand against the deceased, after the same may have been exhibited to him in accordance with the provisions of this act, said claimant may present his claim to the county court for allowance, giving the

executor or administrator ten days' notice of such application to the court." Sections 27 and 393 provide that all actions or suits, except those specially enumerated, shall be prosecuted in the name of the real party in interest. As at present advised, we are of the opinion that under these statutes the claimant mentioned in Section 1161 includes an assignee or successor in interest of the person presenting the claim to the executor for allowance. This is in accordance with the principle running through our statute with relation to the commencement and prosecution of actions, suits, and proceedings.

7. However, this is not a question which can be raised in this court for the first time. The objection that the claim was not presented by the proper person is a matter in abatement only, and waived by joining issue on the merits without raising it in the county court: 10 Enc. Pl. & Pr. 10; *Hopwood v. Patterson*, 2 Or. 49; *Derkeny v. Belfils*, 4 Or. 258; *Chamberlain v. Hubbard*, 26 Or. 428 (38 Pac. 437).

8. The remainder of the petition is devoted to a lengthy and critical discussion of the evidence and the question of the statute of limitations. We do not understand the law as counsel seems to—that on a motion for nonsuit the court will determine the weight and sufficiency of the evidence. Such a motion admits the truth of plaintiff's testimony and every legitimate inference of fact which may be drawn from it. If there is any competent evidence tending to support the plaintiff's case, he is entitled to have it go to the jury. It is only when there is a total absence of testimony that the court can take the case from the jury: *Grant v. Baker*, 12 Or. 329 (7 Pac. 318); *Sovern v. Yoran*, 15 Or. 644 (15 Pac. 395); *Anderson v. North Pac. Lum. Co.* 21 Or. 281 (28 Pac. 5); *Herbert v. Dufur*, 23 Or. 462 (32 Pac. 302); *Brown v. Oregon Lumber Co.* 24 Or. 315 (33 Pac. 557); *Barr v. Rader*, 33 Or. 375 (54 Pac. 210); *Feldman v. McGuire*, 34 Or. 309 (55 Pac. 872); *Perkins v. McCullough*, 36 Or. 146 (59 Pac. 182); *Currey v. Butcher*, 37 Or. 380 (61 Pac. 631). As we stated in the original opinion, there was sufficient evidence tending to show that the notes in suit were executed for the indebtedness of Morgan & Stowell with the knowledge, consent, and acquiescence of Morgan, and that he afterwards ratified

and approved the same by the payment of interest thereon, and other acts recognizing the notes as valid obligations against him, to carry the case to the jury. It is useless to comment upon the testimony in detail. Its weight, sufficiency, and the credibility of the witnesses are all questions for a jury, and not for a court.

We think we have made our position clear on the statute of limitations, and do not deem it necessary to elaborate further. The petition is denied. REVERSED: REHEARING DENIED.

Decided 3 January, 1905.

GRANDE RONDE ELECTRICAL CO. v. DRAKE.

78 Pac. 1031.

STATUTES—APPROPRIATION OF WATERS BY ELECTRICAL COMPANIES—WHEN RIGHT IS PERFECTED—EMINENT DOMAIN.

1. B. & C. Comp. §§ 5022 and 5023, authorize corporations engaged in furnishing electrical power for all purposes to use the surplus water of the streams of the state for water power, and to condemn the rights of riparian proprietors, and also rights of way for ditches. Section 5026 declares that when the point of diversion shall have been selected the appropriator shall post a certain notice thereat, and Section 5027 requires the filing for record within ten days thereafter of a similar notice, and a map showing the general route of the ditch. Section 5028 provides that, when such corporation shall have acquired the right to appropriate water in the manner provided, it may condemn lands necessary for the right of way for its ditch. *Held*, that where a corporation organized for furnishing electrical power for all purposes has selected a point for the diversion of the water of a stream, and has surveyed and located the line of its ditch, and has posted the required notice, and filed the notice and map, its right to appropriate the water is thereby acquired. Thereafter the corporation may maintain an action of condemnation without showing that it is the sole owner of the banks of the stream in question from the point of the proposed diversion to the mouth thereof, or that it has secured from the riparian proprietors below the proposed point of diversion the right to divert the surplus water in such stream.

CONSTITUTION—EMINENT DOMAIN—PRIVATE USE.

2. The provision in Const. Or. Art. I, § 18, that private property shall not be taken for public use without just compensation first assessed and tendered, impliedly prohibits the taking of private property for private use, even though just compensation be made therefor.

EMINENT DOMAIN—LEGISLATIVE AND JUDICIAL QUESTIONS.*

3. The necessity of exercising the right of eminent domain in general classes of cases is a legislative question, but whether the use in a particular instance is public or private, and the extent of the use necessary, are to be determined by the courts as questions of fact; for example, the legislature may determine that corporations furnishing electricity for sale shall be allowed to condemn private property for their use, yet as to the nature of the use to which a particular piece of property is to be put and the extent of the needs of the condemnor, there may be a question, which the courts must decide.

*NOTE.—See 42 Am. St. Rep. 406 for collections of authorities on two questions: Whether the Determination of What is a Public Use is a Legislative or Judicial Question; and Whether the Necessity for Taking May be Disproved. See, also, articles, When the Question of the Existence of a Public Use May be Considered by the Courts, 88 Am. St. Rep. 926-946; and Expediency of Exercise of Right to Condemn, 4 L. R. A. 786, and 7 L. R. A. 151.

SUIT TO CONDEMN WATER AND DITCH RIGHTS FOR ELECTRICAL PURPOSES.
4. Sections 5022-5027 of B. & C. Comp. declare the use of water of the streams of the State for furnishing electrical power for all purposes a public use, and authorize corporations created for such purpose to use such streams therefor, so that the use may not materially impair the rights of prior appropriators, on the corporation complying with certain prescribed conditions. Section 5028 declares that when such corporation shall have acquired the right to appropriate the water "in the manner hereinbefore provided it may proceed to condemn lands and premises necessary for right of way for its ditch"; and Sections 5029 and 5030 authorize such corporations, when authorized as so provided, to appropriate water and construct and maintain a ditch, to maintain an action to condemn a right of way for such ditch, and also for the condemnation and appropriation of the right to the flow of the water in any stream from which it is proposed to divert water below the point of diversion vested in riparian proprietors. *Held*, that a corporation, having so acquired the right to appropriate water, may maintain an action either to condemn land for a ditch, or to condemn the right to have the water flow in the channel of the stream through the premises of a riparian proprietor, or it may sue for both purposes in one action when both rights are vested in the same defendant.

From Union: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This is an action by the Grande Ronde Electrical Co. against A. H. and H. D. Drake to condemn a right of way for a ditch across defendants' premises, and also their interest as riparian proprietors in and to the surplus water of a nonnavigable stream. The complaint states that plaintiff is a corporation organized to construct ditches, and to appropriate the surplus water of Catherine Creek, in Union County, to be used in generating electrical power to operate a railway, to furnish artificial light, and to propel machinery; showing a compliance with the initiatory requirements of the statute (B. & C. Comp. § 5022, et seq.), and averring a necessity for a ditch of the size and capacity stated, an intention to complete the work, a description of defendants' real property affected thereby, and an inability to agree with them as to the compensation to be paid for the injury which they will sustain. It is not alleged, however, that plaintiff is the sole owner of the land bordering on the stream from the point of the proposed diversion to the lower terminus, nor that it had secured from the riparian proprietors the right to divert the surplus water in the creek between those points. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was sustained, and, for a failure further to plead, the action was dismissed, and plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Leroy Lomax*.

For respondent there was a brief over the name of *Crawford & Crawford*, with an oral argument by *Mr. Thomas H. Crawford*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

The question to be considered is whether or not it was necessary, as a condition precedent to the assertion of the right sought to be invoked, to allege in the complaint that plaintiff was the sole owner of all the land bordering on both sides of Catherine Creek, from the head gate of the proposed ditch to the lower terminus thereof, or had secured from the riparian proprietors on that stream the exclusive right to divert and use the surplus waters thereof. A general statement of some of the provisions of the statute on which this action is based, so far as they relate to the power of a corporation to condemn rights of way for ditches, and to appropriate the surplus water of a nonnavigable stream, is deemed essential to a proper understanding of the inquiry involved.

1. The use of water of streams in this State for the purpose of furnishing electrical power for all purposes is declared to be beneficial and a public necessity, and the right to divert unappropriated water therefrom for such use is granted: B. & C. Comp. § 5022. All corporations having title or possessory right to any land shall be entitled to the use and enjoyment of the water of any stream within the State, to furnish electrical power for any purposes, "so that such use of the same does not materially affect or impair the rights of prior appropriations": B. & C. Comp. § 5023. All such corporations may appropriate and divert such waters, and may condemn rights of way for ditches for carrying the same, and may condemn the rights of riparian proprietors upon the stream from which such appropriation is made, upon complying with the terms of this act: B. & C. Comp. § 5024. Such corporations may enter upon any land for the purpose of locating a point of diversion of the water intended to be appropriated, and upon any land lying between such point and the lower terminus of its proposed ditch, for the purpose of examining the same, and of locating and surveying the line of such

ditch: B. & C. Comp. § 5025. When the point of diversion shall have been selected, such appropriator shall post in a conspicuous place thereat a notice in writing containing a statement of the name of the ditch and of the owner thereof, the point at which its head gate is proposed to be constructed, a general description of the course of said ditch, the size or dimensions of the same in width and depth, the number of cubic inches of water (by miner's measurement under a six-inch pressure) intended to be appropriated: B. & C. Comp. § 5026. Within 10 days from the date of posting such notice, such appropriator shall file for record in the office of the county clerk or recorder of conveyances, as the case may be, of the county in which said ditch is situated, a similar notice, and at the same time shall file a map showing the general route of said ditch: B. & C. Comp. § 5027. When such corporation shall have acquired the right to appropriate the water "in the manner hereinbefore provided," it may proceed to condemn lands and premises necessary for right of way for its ditch, not exceeding 50 feet in width: B. & C. Comp. § 5028. Whenever any corporation "authorized as hereinbefore provided to appropriate water and to construct and maintain a ditch," or to furnish electrical power for any purpose, and to condemn lands for right of way, is unable to agree with the owner of such lands as to compensation to be paid therefor, such corporation may maintain an action in the circuit court of the county in which the lands sought to be appropriated are situated, for the purpose of having such lands appropriated to its use, and for determining the compensation to be paid to such owner therefor. The proceedings in such action, to final determination, shall be the same as those prescribed in Chapter 2 of Title 41: B. & C. Comp. § 5029. Such corporation may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion, vested in the owners of lands lying contiguous to such stream by virtue of their location: B. & C. Comp. § 5030.

An examination of the statute, the substance of which has been stated, shows that the legislature has given corporations organized to furnish electrical power for all purposes authority to condemn

the rights of riparian proprietors in and to the flow of the surplus water in the channel of a stream, and also the right to condemn such lands as may be needed for ditches therefrom. It is argued in support of the judgment herein that the compensation required to be paid to the several riparian proprietors for their rights in and to such surplus water may be so great as utterly to defeat the furnishing of electrical power, thereby demonstrating that a condemnation of land as a right of way for a ditch is unnecessary, and hence no error was committed as alleged. It might be contended with equal force, in an action to condemn the diversion and appropriation of the surplus water of a stream, that the cost of securing a right of way for a ditch in which to conduct the water might be so excessive as to exhaust the financial resources of the corporation seeking to assert the power conferred, thus thwarting the purpose for which it was organized, and for that reason the action to condemn the diversion of the surplus water should be deferred until the right of way for a ditch in which to conduct it had been secured. As the right to the uninterrupted flow of water in the channel of a stream, and the ownership of the land across which it may be necessary to construct a ditch, are not always vested in the same person, it would follow, in cases of such diverse right and ownership, if the principle insisted upon were adopted, that a condemnation of either separately could never be enforced. When a corporation organized to furnish electrical power for all purposes has selected a point for the diversion of the water of a stream, surveyed and located the line of its ditch, posted the specified notice at the place and in the manner designated, and filed within the time prescribed a similar notice for record in the proper office, together with a map showing the general route of the ditch, the right to appropriate the water is thereby acquired: B. & C. Comp. § 5028.

2. The organic law of the State, regulating the exercise of the right of eminent domain, is, so far as applicable herein, as follows: "Private property shall not be taken for a public use * * without just compensation * * first assessed and tendered": Const. Or. Art. I, § 18. This clause impliedly prohibits the taking of private property for a private use, though just compen-

sation be made therefor: *Witham v. Osburn*, 4 Or. 318 (18 Am. Rep. 287); *Bridal Veil Lum. Co. v. Johnson*, 25 Or. 105 (34 Pac. 1026).

3. It has been held by this court that the legislative assembly must in the first instance declare the necessity for and the expediency of an exercise of the right of eminent domain in an act conferring power for that purpose, but the question of whether or not a proposed use is in fact public or private is to be determined by the courts, independently of the objects expressed in the charter of the corporation claiming to be the recipient of the authority, or of the statute purporting to confer it: *Bridal Veil Lum. Co. v. Johnson*, 30 Or. 205 (46 Pac. 790, 34 L. R. A. 368, 60 Am. St. Rep. 818); *Apex Trans. Co. v. Garbade*, 32 Or. 582 (52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 513); *Fanning v. Gilliland*, 37 Or. 369 (61 Pac. 636, 62 Pac. 209, 82 Am. St. Rep. 758). Whether or not the employment of the water of a stream to generate electrical power for all purposes is a public or a private use need not now be determined, but may be subsequently tried. Nor is it necessary at this time to inquire whether or not a mere legislative fiat can deprive riparian proprietors of the right which they enjoy under the rules of the common law—to have the water of a stream flow in the channel thereof, undiminished in quantity. It would seem, however, that as authority had been granted to condemn land for a ditch, and also power conferred to condemn the right to have the water of a stream flow in the channel thereof below the point of diversion, the legislative assembly had not intended to deprive or even abridge the rights of a riparian proprietor.

4. Condemnation proceedings are purely statutory, and every condition prerequisite to an exercise of the right must be strictly pursued: *Oregonian Ry. Co. v. Hill*, 9 Or. 377; *Huddleston v. Eugene*, 34 Or. 343 (55 Pac. 868, 43 L. R. A. 440, 1 Munic. Corp. Cas. 334). The clause, "When such * * corporation shall have acquired the right to appropriate water in the manner hereinbefore provided" (B. & C. Comp. § 5028), evidently means, by considering the entire context of the act, that, by a strict compliance with the preceding provisions of the statute, a right to institute an action to condemn the use of water to, which a

riparian proprietor is entitled was thereby initiated, and, for the purpose of cutting off intervening rights, relates back to the date of posting the notice: B. & C. Comp. § 5031. If the phrase "in the manner hereinbefore provided" had been omitted from Section 5028, B. & C. Comp., it is quite probable that an action to condemn land for a ditch could not be maintained until the right to divert the surplus water of a stream had been secured.

It will be observed that the phrase quoted refers to the preceding sections of the act, upon a strict compliance with which the right to appropriate water is acquired. The word "appropriate," in the arid region of the United States, is generally understood to mean an application of water to a beneficial use; but, in the section of the statute to which attention is called, the word under consideration cannot be so construed, where the rights of riparian proprietors have attached to a stream. If a corporation organized to generate electrical power for all purposes was the sole riparian proprietor on a stream, a strict compliance by it with the provisions of Sections 5026, 5027, B. & C. Comp., would probably confer upon it the right to appropriate all the water flowing in the channel, and authorize the maintenance of an action to condemn a right of way for a ditch in which to conduct the water across the lands of other persons. In case such corporation owned all the land bordering on a stream between the point of diversion and the lower terminus of its proposed ditch, the word "appropriate" might probably be used in its ordinary acceptance. That the legislative assembly intended it should receive such meaning only in case the plaintiff in an action to condemn a right of way for a ditch was the sole riparian proprietor to be affected by the diversion of water from a stream, is evident from the fact that Section 5030, B. & C. Comp., authorizes the maintenance of an action to condemn the rights of the bank owners between the points of diversion and the lower terminus of the proposed ditch. To hold otherwise would in some instances defeat the very purposes sought to be subserved by the passage of the act, a fair construction of which in its entirety authorizes, in our opinion, the maintenance of an action either to condemn land for a ditch, or to condemn the right to have the water flow in the channel of a stream through the prem-

ises of a riparian proprietor, or both rights may be joined in one action when vested in the same defendant, as a plaintiff may elect. An examination of Section 5030, B. & C. Comp., will show that in the passage of the act, or in the enrollment, the mode to be pursued in condemning the rights of riparian proprietors is wholly omitted. Whether or not such omission will defeat plaintiff's right to divert the surplus water of Catherine Creek, so far as defendants' interest therein may be involved, need not now be determined, believing, as we do, that this action can be maintained to condemn land for the ditch.

It follows from these considerations that the judgment is reversed, and the cause remanded, with directions to overrule the demurrer, and for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

Argued 9 January, decided 20 February, rehearing denied 27 March, 1905.

STATE v. GUGLIELMO.

79 Pac. 577, 80 Pac. 103.

DUE PROCESS OF LAW—NECESSITY OF INDICTMENT—VALIDITY OF ACCUSATION BY INFORMATION WITHOUT GRAND JURY.

1. The statute permitting district attorneys to file informations charging crimes (B. & C. Comp. §§ 1258-1264), but reserving to circuit judges the discretionary right to call grand juries, is not unconstitutional under Const. U. S. Amend. XIV, prohibiting the deprivation of liberty without due process of law, nor under Const. Or. Art. VII, § 18, providing for the selection or abolishment of grand juries.

NECESSITY OF INFORMATION BEING UNDER OATH.

2. An indictment or information in the form set forth in the statute, B. & C. Comp. § 1304, is sufficient, though it does not purport to be under oath, as both the grand jury and the district attorney are required to perform their duties under their oaths of office, and presumably their duties were so discharged: B. & C. Comp. § 788, subd. 15.

JUDICIAL NOTICE OF APPOINTMENT AND POWER OF DEPUTY DISTRICT ATTORNEY—VERIFICATION OF INFORMATION.

3. Courts will take judicial notice of the appointment and scope of authority of their officers, including deputies; thus: Where it appears in a criminal case that the information has been prepared and filed by a deputy district attorney, the court will take notice of the official position of the deputy and of his authority, so that proof is not necessary on either point.

EFFECT OF MOTION TO SET ASIDE INFORMATION.

4. A motion to set aside a criminal information on the ground that it was not found, indorsed, or presented as required by law was insufficient to challenge the appointment of the deputy district attorney who prepared and filed the information.

INFORMATION—IMPLIED OATH.

5. An information prepared and filed by a deputy district attorney is in effect the act of the district attorney himself and therefore performed under oath, though the deputy is not a sworn officer, particularly where the principal officer calls the case for trial on the information so filed.

PROSECUTION BY INFORMATION IS DUE PROCESS OF LAW.

6. A prosecution for a felony by an information constitutes due process of law as that term is used in the Fourteenth Amendment to the Constitution of the United States.

POWER OF DISTRICT ATTORNEY TO FILE INFORMATION.

7. A district attorney in Oregon has power to file informations for both misdemeanors and felonies without permission of court, acting upon his own initiative, as did the attorney general of England under the common law; but here the authority is derived directly from the statutes, and not from the common law.

INFORMATION—REQUIREMENT OF SUPPORT OF OATH.

8. An information is supported by oath, as required by the Fourth Amendment to the Constitution of the United States, and Article IX of the Bill of Rights of Oregon, since it is filed by the district attorney, who is an officer acting under an official oath, performing the duties formerly devolving on a grand jury.

INFORMATION—RATIFICATION OF SIGNATURE MADE BY DEPUTY.

9. A district attorney, having assisted in prosecuting accused, and being present when he was arraigned, and having secured an extension of time within which to plead, adopted and ratified the signing of his name to the information by another.

From Multnomah: JOHN B. CLELAND, Judge.

Frank Guglielmo was convicted of murder in the first degree and appeals.

AFFIRMED.

For appellant there was a brief over the names of *Daniel Raphael Murphy*, *John Francis Logan* and *Ralph Elmo Moody*, with an oral argument by *Mr. Murphy* and *Mr. Moody*.

For the State there was a brief and an oral argument by *Mr. Andrew Murray Crawford*, Attorney General, and *Mr. John Manning*, District Attorney.

MR. JUSTICE MOORE delivered the opinion of the court.

The defendant, Frank Guglielmo, was informed against, tried, and convicted of the crime of murder in the first degree, alleged to have been committed in Multnomah County June 14, 1904, by killing one Freda Guarascia, and from the judgment which followed he appeals.

1. It is insisted by his counsel that the court erred in denying their motion to set aside the information on the ground that it violated the Fourteenth Amendment of the Constitution of the United States, and was also repugnant to Section 18 of Article VII of that of this State. It is argued that these sections of organic law guarantee to every suspected person the right to be charged by indictment found and returned by a grand jury, before he can be required to plead; that, though our state constitution authorizes the legislature to "modify or abolish" grand

juries, it must do so either by increasing or diminishing the number of "the most competent of the permanent citizens of the county" of which that body is composed (*State v. Lawrence*, 12 Or. 297, 7 Pac. 116; *Zabriskie v. Hackensack, etc., Ry. Co.* 18 N. J. Eq. 178, 90 Am. Dec. 617), or by totally abrogating the system; that the act of February 17, 1899' (B. & C. Comp. §§ 1258-1264), empowering the trial court to convene a grand jury, demonstrates that such inquisitorial body has not been abolished, nor has it been modified, for the authority attempted to be conferred by that act upon the district attorney to charge the commission of crimes by information only is the substitution of a single person, not chosen in the manner prescribed by the fundamental law of this State for the selection of grand jurors. This question was duly considered in the case of *State v. Tucker*, 36 Or. 291 (61 Pac. 894, 51 L. R. A. 246), and decided adversely to the defendant's contention; and, believing that the conclusion there reached is supported by reason and authority, we adhere to and reaffirm the legal principles thus announced: *Hurtado v. California*, 110 U. S. 516 (4 Sup. Ct. 292, 28 L. Ed. 232); *Bolln v. Nebraska*, 176 U. S. 83 (20 Sup. Ct. 287, 44 L. Ed. 382). In the case *In re Boulter*, 5 Wyo. 329 (40 Pac. 520), Mr. Chief Justice GROESBECK, in a very able opinion, answers the questions presented by defendant's counsel on this branch of the case, and shows that the doctrine contended for herein is without merit.

2. The defendant, never having had or waived a preliminary examination, was charged with the commission of the alleged crime by an information not sworn to by any person, upon filing which the court ordered a bench warrant to be issued for his arrest, though he was then in custody; having been apprehended for the crime with the commission of which he was charged. It is maintained by his counsel that this warrant was issued without probable cause, because it was not supported by oath or affirmation, and that an error was committed in overruling the motion to set aside the information, based on the ground that it violated Section 9 of Article I of the constitution of this State, prohibiting the issuing of warrants for the arrest of any person, except upon probable cause, supported by oath or affirmation. At common law the commission of crimes was charged either by indictment

or information, depending in most instances upon the grade of the offense. An indictment was an accusation at the suit of the sovereign, based on the oath of 12 men of the county wherein the offense was committed: 2 Hawk. P. C. 287. The form usually prescribed for the commencement of an indictment was, after stating the venue, as follows: "The jurors for our lady the Queen upon their oath present," etc.: 1 Archbold, Crim. Pr. & Pl. *76. Sir Matthew Hale, in speaking of the caption of a written accusation, and of the necessity of stating therein the oath of the jurors, says: "It must return that the indictment was made per sacramentum": 2 Hale's P. C. 167. The form of indictment prescribed by the legislative assembly of this State omits a recital of the oath of the grand jurors: B. & C. Comp. § 1304. Before the grand jury can enter upon the discharge of their duties, however, an oath is required to be administered to them, the form of which is also ordained: B. & C. Comp. § 1271. It has been repeatedly held in this State that the form of indictment given in the statute was sufficient: *State v. Dodson*, 4 Or. 64; *State v. Spencer*, 6 Or. 152; *State v. Brown*, 7 Or. 186; *State v. Lee Yan Yan*, 10 Or. 365; *State v. Ah Lee*, 18 Or. 540 (23 Pac. 424). In civil actions it is unnecessary to allege a fact which the law will presume: Bliss, Code Pl. (3 ed.), § 175. It will be presumed that official duty has been regularly performed (B. & C. Comp. § 788, subd. 15); and hence, arguendo, it would seem that an indictment complying with the form recommended by the legislative assembly, though omitting a recital therein of the oath of the grand jurors, was sufficient.

At common law an information was a surmise or suggestion upon record, made on behalf of the sovereign to a court of criminal jurisdiction, charging a person with the commission of a misdemeanor: *Wilkes v. The King*, 6 Brown, Parl. Cases, 345; *United States v. Tureaud* (C. C.), 20 Fed. 621. "Informations," says a text-writer, referring to such accusations made under the ancient rule, "are of two kinds: First, such as are merely at the suit of the King; secondly, such as are partly at the suit of the King, and partly at the suit of the party": 2 Hawk. P. C. 356. Blackstone, speaking of criminal informations, in distinguishing the two kinds, exhibited in the name of the King, says:

"First, those which are truly and properly his own suits, and filed ex officio by his own immediate officer, the attorney general; secondly, those in which, though the King is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the King's coroner and attorney in the Court of King's Bench, usually called the 'Master of the Crown Office,' who is for this purpose the standing officer of the public. The objects of the King's own prosecutions, filed ex officio by his own attorney general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of immediate prosecution, without waiting for any previous application to any other tribunal, which power, thus necessary not only to the ease and safety, but even to the very existence, of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations filed by the master of the crown office upon the complaint or relation of a private subject are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of any atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney general), but which, on account of their magnitude or pernicious example, deserve the most public animadversion": 4 Bl. Com. *308. In the reign of Henry VII, the remedy by information, exhibited on leave of court by the master of the crown office, became the means of great oppression to the subjects of England, and so continued with little abatement until 4 and 5 William and Mary, c. 11, and c. 18, which provided, in effect, that the clerk of the crown, in the court of the King's Bench, should not, without express authority, to be given by the court when in session, exhibit, receive, or file any information for any of the causes for which it was allowable, nor issue any process thereon, without taking a recognizance from the person procuring such information to

be exhibited, but that the act should not extend to any other information than such as should be exhibited in the Court of King's Bench by the master of the crown office: 2 Hawk. P. C. 358.

This learned author, after quoting the acts, the substance of which is here given, makes the following declaration: "From whence it follows that informations exhibited by the attorney general remain as they were at the common law." In *King v. Joliffe*, 4 Durn. & E. 285, Lord Chief Justice KENYON, referring to the act regulating the exhibition of informations by the master of the crown office, says: "Before the statute 4 & 5 W. & M. c. 18, it was in the power of any individual to file an information, without disclosing to the court the grounds on which it was exhibited. But that practice being attended with the inconveniences recited in the preamble to that statute, it was enacted that no information should be filed without the express order of the court publicly given. That statute does not enumerate the grounds which are sufficient to enable us to grant the information, but the legislature left it to our discretion, trusting that we should not so far transgress our duty as to go beyond the rules of sound discretion. In ordinary cases affidavits are sworn in the court for the express purpose of praying an information upon them, but that does not preclude us from granting an information on affidavits equally authentic, although not made for that purpose." Sir James Fitzjames Stephen, in his *History of the Criminal Law of England* (volume 1, p. 296), in referring to the act of 1692, regulating informations exhibited by the master of the crown office, also observes: "The practical result of this statute has been to make a motion for a criminal information practically equivalent to a proceeding before magistrates in order to the committal of the accused." This distinguished jurist, on the page of his valuable work preceding that from which the foregoing excerpt is taken, in referring to the statute of 1494 (11 Hen. VII, c. 3), remarks: "This act was the one under which Empson and Dudley earned their obscure infamy." Blackstone, alluding to the act last referred to, and also to another ordained in the reign of the same sovereign, makes the following statement: "But when the statute, 3 Hen. VII, c. 1,

had extended the jurisdiction of the Court of Star Chamber, the members of which were the sole judges of the law, the fact, and the penalty, and when the statute, 11 Hen. VII, c. 3, had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assizes or before the justices of the peace, who were to hear and determine the same according to their own discretion, then it was that the legal and orderly jurisdiction of the Court of King's Bench fell into disuse and oblivion, and Empson and Dudley (the wicked instruments of King Henry VII), by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices, continually harassed the subject and shamefully enriched the crown": 4 Bl. Com. *310.

It was the fear, undoubtedly entertained by the citizens of this country, that a violation of the rights of personal liberty, as practiced in England in the reign of King Henry VII, might possibly be repeated to their injury, that prompted congress to propose and secure the adoption of the Fourth Amendment to the Constitution of the United States. As this amendment was never intended to limit the powers of the states in respect to their own people, but was designed to operate on the national government only (*Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. 21, 22, 31 L. Ed. 80; *Bolln v. Nebraska*, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382), the framers of the constitution of this State embodied the substance thereof in the Bill of Rights, which declares: "No law shall violate the right of the people to be secure in their persons, houses, papers and effects, against unreasonable search or seizure; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized": Const. Or. Art. I, § 9. This restrictive clause has been incorporated into the statute of this State, which, so far as deemed involved herein, is as follows: An information is the allegation or statement made before a magistrate, and verified by the oath of the party making it, that a person has been guilty of some designated crime: B. & C. Comp. § 1581. When complaint is made to a magistrate of the commission of a crime, he must examine the informant on oath, and reduce his statement to

writing, and cause the same to be subscribed by him, and also take the depositions of any witnesses that the informant may produce in support thereof: B. & C. Comp. § 1584. Thereupon, if the magistrate be satisfied that the crime complained of has been committed, and that there is probable cause to believe that the person charged has committed it, he must issue a warrant of arrest: B. & C. Comp. § 1585. The necessity of satisfying the magistrate that the crime complained of has been perpetrated, and that there is probable cause to believe that the person charged has committed it, as a condition precedent to the issuing of a warrant of arrest, is analogous to the leave of court which the master of the crown office in England was obliged to secure before he was permitted to exhibit an information in the name of his sovereign.

At common law the attorney general, ex officio, was invested with a discretionary power of filing informations charging the commission of misdemeanors, and hence he was not obliged to ask for or obtain leave of court before exercising the responsibility that devolved upon him by virtue of his office: 4 Bl. Com. *309. Thus, in *Rex v. Phillips*, 3 Burr. 1564, it was ruled that the attorney general had a right himself, ex officio, to exhibit an information without leave of court; Lord MANSFIELD saying: "This is not a case within the act of 4 W. & M. c. 18." To the same effect is *Rex v. Mayor of Plymouth*, 4 Burr. 2089, in which case the same learned justice also remarked: "If it appears to the King's attorney general to be right to grant an information, he may do it himself. If he does not think it so, he cannot expect us to do it." The discretionary power vested in and exercised by the attorney general at common law devolves, in this country, in the absence of any statutory regulations, on the district attorneys (*State v. Douglas County Road Co.* 10 Or. 198; *State ex rel. v. Lord*, 28 Or. 498, 43 Pac. 471, 31 L. R. A. 473), who are entitled to prosecute persons for the commission of crimes by information, as a right pertaining to their office, and without leave of court: 1 Bishop, New Crim. Proced. § 144; *State v. Kyle*, 166 Mo. 287 (65 S. W. 763, 56 L. R. A. 115). "Therefore," says Mr. Justice THOMAS in *State v. Ransberger*, 106 Mo. 135 (17 S. W. 290), "when the prosecuting attorney files an

information, it is always official. It is his accusation, and for it he is responsible." In *Territory v. Cutinola*, 4 N. M. 160 (14 Pac. 809), it was held, notwithstanding the Fourth Amendment to the Constitution of the United States was in force in the Territory of New Mexico, that, under the rules of the common law as adopted in this country, it was not essential that an information filed ex officio by a prosecuting attorney, charging the commission of a misdemeanor, should be supported by affidavit. In that case the court criticises the decision of BILLINGS, J., in *United States v. Tureaud* (C. C.), 20 Fed. 621, cited by defendant's counsel, and states that the part of the opinion relied upon "is the mere dictum of the judge, and cannot be regarded as authority." Section 11 of Article II of the Constitution of Missouri, adopted October 30, 1875, declares that no warrant to seize any person shall issue without probable cause, supported by oath or affirmation reduced to writing. Section 12 of Article II of the organic law of that State, which originally provided for the prosecution of felonies by indictment only, was amended by resolution of the legislature, which, having been adopted by a vote of the people, took effect December 19, 1900, substituting the following in lieu of the former clause, to wit: "No person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be construed to apply to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger": Laws Mo. 1899, p. 382. After this amendment was adopted, it was held, notwithstanding the constitution of that State required the oath or affirmation supporting the probable cause to be reduced to writing, that a prosecuting attorney might file a criminal information based on his official oath: *State v. Kyle*, 166 Mo. 287 (65 S. W. 763, 56 L. R. A. 115); *State v. Pohl*, 170 Mo. 422 (70 S. W. 695); *State v. Fletchall*, 31 Mo. App. 296; *State v. Wilkson*, 36 Mo. App. 373; *State v. Parker*, 39 Mo. App. 116.

The Bill of Rights of this State does not demand that the oath or affirmation sustaining the probable cause shall be reduced to writing, nor does our statute require an information charging the commission of a crime to be verified; and, in the absence of

any enactment on the subject, the rules of the common law in relation to informations exhibited by the attorney general are applicable and controlling. The district attorney of the proper judicial district in this State is responsible for all informations filed, and is not obliged to obtain leave of court to discharge his duty in this particular before he is permitted to exercise the discretion with which the law invests him. As the circuit court is authorized to convene a grand jury when deemed advisable (B. & C. Comp. § 1264), indictments and informations are therefore concurrent remedies, and, as the former means of charging the commission of a crime is based on and supported by the oath of the grand jurors, which fact, in this State, need not be recited in the written accusation, so an information, under our statute, need not be verified, for the official oath of the person whose duty it is to prosecute the formal charge complies with the requirement of the organic act, and supplies the necessary oath or affirmation, thereby supporting the probable cause.

3. It is contended by defendant's counsel that the District Attorney for the Fourth Judicial District did not prepare or file the information herein, and hence the court erred in denying their motion to set it aside. John Manning, the officer mentioned, having been called as a witness by defendant's counsel, testified that his signature to the information was not affixed by him, and that he was not in Portland the day the information was filed. L. C. Hartman and J. P. Fones, whose names are indorsed on the information, appearing as defendant's witnesses, severally testified that, in furnishing evidence as a basis for the information, they were sworn and examined in the office of the district attorney by a deputy. That part of the statute authorizing a prosecuting officer to nominate representatives is as follows: "A district attorney, during his continuance in office, shall be entitled to appoint as many deputies in each county as he may deem necessary, and may, by a written appointment filed with the clerk of the circuit court of the county, authorize such deputies, or any of them, to attend upon the sittings of the grand jury, and to attend to and transact all business pertaining to the district attorney's office": B. & C. Comp. § 2927, as amended by the act of December 28, 1903: Sp. Laws 1903, p. 32. No evi-

dence was offered at the trial tending to show that the appointment of the deputy who signed the name of the district attorney to the information was in writing, or the extent of the power delegated to him.

At common law, though the attorney general was authorized to exhibit informations, without leave of court, charging the commission of misdemeanors, if that office was vacant the solicitor general was empowered to discharge that duty. In *Wilkes v. The King*, 6 Brown, Parl. Cases, 345, it was ruled that notice of the right of the solicitor general to exhibit an information would be taken, without proof of the vacancy in the office of attorney general. In that case it is said: "That the attorney and solicitor generals are invested by their offices with general authority to commence and prosecute the suits of the crown. It is true, the attorney general, as the superior officer, has the direction and control of his majesty's prosecutions, in which the solicitor general seldom interferes; but it is equally true that during the vacancy of the office of attorney general all the suits of the crown, both criminal and civil, are commenced, prosecuted, and carried on by the solicitor general; that at the time when these informations were filed against Mr. Wilkes the office of attorney general was vacant, and consequently the solicitor general was the proper officer to exhibit them. But it is said that the fact of the vacancy ought to appear upon the record. The only pretense for such an averment is to inform the court of the vacancy, as an inducement to receive the information from the solicitor general, but there is no necessity for that intelligence. The attorney general is, in truth, an officer of, and has a place in, the Court of King's Bench, and the court will take notice of the vacancy of the office; and there are multitudes of instances of suits commenced and prosecuted by the solicitor general on behalf of the crown, without any averment or notice taken of the vacancy of the office of attorney general." In *Choen v. State*, 85 Ind. 209, it was held that an indictment, signed by a person as "special prosecuting attorney" was not subject to a motion to quash, or vulnerable to a plea in abatement which did not deny the due appointment of such special prosecuting officer. In deciding that case, Mr. Justice Woods

says: "A court takes cognizance of its own officers and of the genuineness of their official signatures and designations."

4. In the case at bar the motion to set aside the information is based on the ground that it was not found, indorsed, or presented as required by law. This objection was insufficient to challenge the appointment of the deputy district attorney, and, as the trial court is presumed to be cognizant of its own officers and of the measure of their powers, no proof of the appointment of the deputy was necessary.

5. There being no issue on this question, it must be assumed that the deputy district attorney possessed plenary power, and was authorized to examine witnesses to enable him intelligently to charge persons with the commission of crimes, to prepare informations, sign the name of the district attorney thereto, and to file them in the circuit court: *People v. Etting*, 99 Cal. 577 (34 Pac. 237); *United States v. Nagle*, Fed. Cas. No. 15,852. In *State v. Belding*, 43 Or. 95 (71 Pac. 330), it was held that the district attorney having filed an information containing his name, printed under the indorsement, "A true information," thereby adopted such printed name as his own signature, which bound him as effectually as if he had personally subscribed it to the accusation. So, too, in the case at bar, when the district attorney insisted on the defendant's pleading to the information, he thereby ratified the subscription of his name by his deputy. The district attorney, by virtue of his election and oath of office, was authorized formally to charge persons with the commission of crimes perpetrated or consummated in the judicial district in which he was chosen, and, invoking the maxim, "Qui facit per alium facit per se," when he caused the defendant to go to trial on the information filed by his deputy he thereby verified under his official oath the facts constituting the gravamen of the charge. The office of deputy district attorney was not created by the organic law of this State, so as to require the appointee to swear to support the Constitution of the United States and of this State (Const. Or. Art. XV, § 3), nor have we been able to find any statutory provision demanding that he shall take an oath of office; but as the deputy, in the case at bar, did not subscribe his own name to the information, but signed that of the prosecuting

attorney, who is a constitutional officer (Const. Or. Art. VII, § 17), and specially required to take an oath of office (B. & C. Comp. § 2502), the information, which states the facts constituting the probable cause (*Jones v. Robbins*, 8 Gray, 329), is supported by an oath.

Believing that the defendant had a fair and impartial trial in the manner prescribed by law, and that no prejudicial error was committed, the judgment is affirmed. **AFFIRMED.**

Decided 27 March, 1905.

ON MOTION FOR REHEARING.

MR. JUSTICE MOORE delivered the opinion.

6. It is contended by defendant's counsel, in their petition for a rehearing, that if it be conceded, as stated in the former opinion herein, that a district attorney in this State possesses the power, formerly exercised ex officio by the attorney general in England, of exhibiting informations for misdemeanors only, a district attorney in Oregon has no authority in that manner to charge a felony. The legal principle insisted upon challenges the power of the legislative assembly to confer upon the district attorney such authority. The only reason that can be assigned to support this point is that such a procedure is violative of the Fourteenth Amendment to the Constitution of the United States, in that it may result in the deprivation of life or liberty without due process of law. The Supreme Court of the United States, in construing this clause, has settled all controversy on the subject by holding that the prosecution of a person for a felony by an information only constitutes due process of law: *Hurtado v. California*, 110 U. S. 516 (4 Sup. Ct. 292, 28 L. Ed. 232); *Bolln v. Nebraska*, 176 U. S. 83 (20 Sup. Ct. 287, 44 L. Ed. 382).

7. The similarity of power exercised ex officio under the rules of the common law by the attorney general of England, and that employed by a district attorney in this State, lies in the fact that the former was, and the latter, in the absence of legislation on the subject, is, authorized to perform the duties devolving upon him without leave of court. A district attorney may therefore, in his own discretion, file an information charging the commission of any crime committed or triable in the county for

which he is elected or appointed. An examination of the rules of the common law, and an investigation of the mode of practice pursued by the attorney general of England thereunder, necessarily lead to the conclusion that a district attorney in this State, in the absence of any enactment on the subject, possesses the same measure of power exercised by him, and hence is not, like the master of the crown office, obliged to secure leave of court before he can exercise his discretion, but, like such attorney general, he has authority to file informations charging the commission of misdemeanors. This is the limit to the analogy between the powers of these officers, but, to the extent of the similarity indicated, the ancient law is germane and governs, demonstrating that a district attorney in this State possesses plenary power to file informations without permission of court.

His authority, however, so far as it relates to the filing of informations charging the commission of felonies, is not derived from the common law, but directly from the legislative assembly: B. & C. Comp. § 1258. The organic law of this State, in commanding the method to be pursued in securing jurors, is as follows: "The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. But the legislative assembly may modify or abolish grand juries": Const. Or. Art. VII, § 18. The legislative assembly, exercising the power thus reserved, passed an act, which was approved February 17, 1899 (Laws 1899, p. 99), authorizing the district attorney of any judicial district in this State to file informations charging persons with the commission of any crimes defined and made punishable by the laws of Oregon that have been committed in the county where the information is filed: B. & C. Comp. § 1258. The information specified shall be substantially in the form prescribed for an indictment (B. & C. Comp. § 1304), except that the words "district attorney" shall be used instead of the words "grand jury" wherever the same occur: B. & C. Comp. § 1259. The information, when filed, shall be construed like, and deemed to be in all respects the same as, an indictment, and

the same proceedings shall be had, and with like effect, as in cases where indictments are returned by a grand jury: B. & C. Comp. § 1260. Any person within this State can be compelled by subpoena to appear before a district attorney to testify concerning any crime inquired of by him: B. & C. Comp. § 1261. The name of each witness thus examined by the district attorney shall be inserted at the foot of or indorsed upon the information before it is filed: B. & C. Comp. § 1262.

A perusal of the act in question, the substance of which is hereinbefore stated, will show that it is in effect a modification of the grand jury system, whereby that inquisitorial body has, except when in the opinion of the court deemed advisable (B. & C. Comp., § 1264), been superseded by the district attorney, who can find informations only on the testimony of witnesses taken before him, which tends to show that a crime has been committed in the county, and that there is reasonable cause to believe that the person to be charged is connected therewith and can upon a trial therefor be convicted thereof. The change in the manner of initiating criminal actions is a reasonable exercise by the legislative assembly of the power reserved by the people in the fundamental law, and because their representatives, when assembled, considered it appropriate to designate the district attorney as the proper person formally to charge the commission of crimes, his right to employ the authority conferred is as well founded as if the control in such matters had been delegated to any other person or number of persons.

8. "An information," as defined by the legislative assembly in 1864, "is the allegation or statement made before a magistrate, and verified by the oath of the party making it, that a person has been guilty of some designated crime": B. & C. Comp. § 1581. In modifying the grand jury system, the legislative assembly in 1899 designated the formal charge of the commission of a crime made by the district attorney as an "information," but the accusation in writing might have been indicated as well by any other name. The word "information," as defined in the statute first enacted, refers to the charge made before a magistrate, and in the last act to the complaint made by a district attorney. We do not think the legislative assembly, by desig-

nating the formal charge last referred to as an "information," thereby intended that the word used should be understood as meaning a verified statement, and for this reason resort must be had to Section 9 of the Bill of Rights of this State, and not to the statute defining the word, to determine whether or not the information filed by the district attorney should be verified by an oath indorsed thereon or specially made with reference thereto. The affidavits required to support the probable cause were originally sworn in the court for the express purpose of praying an information upon them: *King v. Jolliffe*, 4 Durn. & E. 285. As at common law the attorney general in England ex officio exhibited informations for misdemeanors without leave of court, no necessity existed for the making of an affidavit to support the probable cause, except by the master of the crown office. This was the rule of the common law as announced in *King v. Jolliffe*, 4 Durn. & E. 285, when the Fourth Amendment to the Constitution of the United States was ratified, and also when Section 9 of the Bill of Rights of this State was adopted, commanding that no warrant should be issued but upon probable cause, supported by oath or affirmation. A reasonable interpretation of the clause of the organic law of this State, to which attention is called, when read in connection with the rules of the common law, leads to the conclusion that an indictment found and returned by a grand jury need not be specially verified by an oath of any person, and that the same rule also applies to informations exhibited without leave of court, which are in effect indictments found and returned by the district attorney. Where, however, leave of court is required as a condition precedent to the filing of an information, it would seem that the probable cause must be supported by an oath or affirmation before any warrant can be issued, unless the accused has had or waived a preliminary examination: *Ratcliff v. People*, 22 Colo. 75 (43 Pac. 553); *Holt v. People*, 23 Colo. 1 (45 Pac. 374); *Noble v. People*, 23 Colo. 9 (45 Pac. 376). As a district attorney in this State is not required to secure leave of court before he can file an information charging the commission of a crime, and as he has in effect been subrogated in lieu of the grand jurors in this respect, so that an information filed by him is tantamount to an

indictment returned by the grand jury, we think his oath of office, though promissory, is equivalent to the oaths of the grand jurors which are assertory, and each sufficiently supports the probable cause, though not indorsed thereon or specially connected therewith.

9. It is insisted by defendant's counsel that the bill of exceptions fails to disclose the person who subscribed the district attorney's name to the information. We think this question is unimportant, for the district attorney, having assisted in prosecuting the defendant, and being present when he was arraigned and secured an extension of time within which to plead, thereby adopted the signature appended to the written accusation, and ratified the act of the person who subscribed his name thereto: *State v. Belding*, 43 Or. 95 (71 Pac. 330).

The bill of exceptions shows that the district attorney was absent from Multnomah County June 15, 1904, the day the information was filed, at which time it also appears that a bench warrant for the arrest of the defendant was "ordered" to be issued on the motion of a deputy of the district attorney. Based on this condition of the transcript, it is contended by defendant's counsel that if ratification by the district attorney gave validity to the information, which they deny, such confirmation did not occur until after the bench warrant was executed, and hence it was issued without authority. The court's order that a bench warrant be issued is in effect a judgment awarding the relief demanded by the deputy district attorney when the information was filed. The issuance of the warrant in pursuance of such judgment is a ministerial act performed by the clerk of the court, usually upon the request of the officer entitled thereto. The bill of exceptions shows that on June 16, 1904, the district attorney was in the court when the defendant first appeared therein, but, no copy of the warrant being set out in the record, it does not affirmatively appear that the *capias* was not "issued" at the request of the district attorney himself before he took any part in the action in open court, thereby ratifying the finding of the information, and verifying it with his official oath, prior to the issuance of the bench warrant. The defendant had been arrested for the commission of the crime of which he was con-

victed, and was confined in jail therefor when the information was filed. His incarceration, therefore, rendered the immediate issuance of a bench warrant unnecessary, and the reasonable probabilities strengthen the conclusion reached, that the capias was not issued by the clerk until June 16, 1904, and then, possibly, upon the præcipe of the district attorney.

It follows from these considerations that the petition for a rehearing is denied.

AFFIRMED: REHEARING DENIED.

Argued 26 January. decided 3 April, rehearing denied 22 May, 1905.

FLEISHMAN v. MEYER.

80 Pac. 209.

PLEADING SEPARATE DEFENSES—WAIVER OF MOTION TO STRIKE OUT—WAIVING RIGHT TO REQUIRE AN ELECTION.

1. An objection to an answer because it contains several defenses not separately stated must be made by a motion to strike, under Section 81, B. & C. Comp., or it will be considered as waived, and cannot afterward be urged. For instance, after replying to an answer containing several defenses, plaintiff cannot at the trial ask that defendant elect on which defense he will rely.

WHEN ELECTION OF DEFENSES MAY BE REQUIRED.

2. An election of remedies or defenses will not be required unless the facts constituting the different causes or defenses are so inconsistent that the proof of one disproves another.

This is an instance where an election should not be required. In an action for damages for failure to deliver personal property within the time required by the contract of sale, the answer set out as an excuse the condition of the bar at the entrance of a bay which was a part of the route for delivery by water, caused by storms which had prevailed for a long time prior to the date limited for delivery, and the cause of failure to deliver was alleged to be an act of God. The answer also set out the receipt by plaintiffs, after the time limited for delivery, of a portion of the property, in pursuance of a modified agreement, and it was averred that plaintiffs thereby waived all demands arising out of the original contract. *Held*, that, even though the answer set out more than one defense, the averments therein were not so inconsistent as to compel the defendants to elect on which one they would rely.

ACT OF GOD AS EXCUSING NONPERFORMANCE OF CONTRACT.

3. The act of God that will excuse the failure to perform a contract must be one that renders performance physically impossible, not merely impossible by the means usually employed. Thus, performance of a contract to deliver chattels at a distant point usually reached by water, yet with a usable land route, is not excused by storms interrupting navigation, for access by land was still available.

DENYING MATTER OF INDUCEMENT.

4. Matters of inducement in a pleading are not material, and need not be denied.

RESPONSIBILITY FOR INVITED ERROR.

5. Error brought about by the conduct of a complaining party is not available; as, where plaintiffs, instead of ignoring matter of inducement in an answer, denied it, any error in admitting evidence tending to prove such matters, because presenting to the jury an immaterial issue, calculated to mislead them, was invited by plaintiffs' pleading, and hence is not available error.

ATTORNEY AND CLIENT—COMPROMISING CLAIM.

6. Outside of pending litigation, and unless under exceptional circumstances, an attorney has no implied authority to compromise or settle a client's claim.

From Lane: JAMES W. HAMILTON, Judge.

Statement by MR. JUSTICE MOORE.

This is an action by I. Fleishman and D. J. Guggenhime, partners as Guggenhime & Co., against Michael Meyer and William Kyle, partners as Meyer & Kyle, to recover damages alleged to have been sustained in consequence of the breach of an agreement. The facts are that on May 4, 1903, the parties entered into the following contract:

"Meyer & Kyle, of Mapleton, Oregon, have this day sold to Guggenhime & Co., of San Francisco, and Guggenhime & Co. have this day bought of Meyer & Kyle, about five tons more or less choice cascara sagrada at three and three eighths (3 $\frac{3}{8}$) cents per pound, delivered, San Francisco. Shipment to be made early during the season as possible, but to reach San Francisco not later than October 1, 1903. Goods to be choice quality, well cured and dried and free from moss and to be put up in strong bags, one-half wool bags preferred. Terms: Cash, after receipt and inspection of goods at San Francisco.

Guggenhime & Co., Buyer.

Meyer & Kyle, Seller."

The plaintiffs, not having received any of the bark, commenced this action November 27, 1903, alleging that on October 1st of that year choice cascara sagrada, at San Francisco, was of the market value of 15 cents per pound, and that by reason of defendants' failure to deliver the goods, they had been damaged in the sum of \$1,162.50. The answer denies the material allegations of the complaint, and, for a further defense, avers that the only means of conveying freight from Mapleton, Oregon, defendants' place of business, to San Francisco, was by vessels, as plaintiffs well knew, whereupon it was understood and agreed that the bark should be transported in that manner; that on October 1, 1903, defendants were ready and willing to ship such bark, but, by reason of the act of God, to wit, the condition of the bar at the entrance of the Siuslaw Bay, caused by storms which for a long time prior thereto had prevailed, they were, without their fault, prevented from keeping the terms of their

agreement, and so notified plaintiffs, who, on October 23, 1903, stipulated in writing, in consideration of the premises, and by way of compromise, to accept two and one half tons of such bark at the price agreed upon, provided it was shipped to them as soon as a vessel could cross the bar; and that, in pursuance of the modified agreement, defendants on November 25, 1903, shipped and delivered at San Francisco 5,216 pounds of cascara sagrada, which plaintiffs received and accepted, thereby waiving any and all demands arising out of the original contract, and in full performance thereof. The reply denies the material allegations of new matter in the answer, except the receipt of the bark shipped by the defendants, for which it is averred plaintiffs paid the contract price, and judgment is demanded therein for the sum of \$556.14 damages alleged to have been sustained by reason of defendants' failure to deliver the entire quantity originally agreed upon, though in a letter written June 25, 1903, by plaintiffs to defendants, the following language appears:

"The expression in a contract 'more or less' always signifies 10 per cent. Therefore, if you have a contract with us for 10,000 lbs. we must be satisfied if you ship us only 9,000 lbs., but this we certainly expect."

A trial being had, defendants secured judgment for their costs and disbursements, and plaintiffs appeal. REVERSED.

For appellants there was a brief over the names of *Teal & Minor, George B. Dorris* and *William C. Bristol*, with an oral argument by *Mr. Joseph N. Teal*.

For respondents there was a brief over the names of *Thompson & Hardy* and *L. Bilyeu*, with an oral argument by *Mr. Charles A. Hardy* and *Mr. Bilyeu*.

MR. JUSTICE MOORE delivered the opinion.

1. The sufficiency of the answer was not challenged by motion or demurrer, but, after the jury were impaneled, plaintiffs' counsel, insisting that such pleading contained several defenses not separately stated, orally requested the court to require defendants to elect upon which one they would rely at the trial; but, the application having been denied, an exception was saved, and it is maintained that an error was thereby committed. The statute

permits a defendant to set forth by answer as many defenses as he may have, but they must be separately stated, and refer to the cause of action to which they are intended to apply: B. & C. Comp. § 74. "The statute," says a text-writer, "while permitting several defenses and several counterclaims, requires them to be separately stated; and, if a single statement contains one defense, followed by allegations that will constitute another, the latter should be stricken out": Bliss, Code Pl. (3 ed.), § 424. A motion to strike out a pleading because several causes of defense therein are not separately stated must be made within the time required for answering such pleading: B. & C. Comp. § 81. In construing this section it was held in *United States v. Ordway* (C. C.), 30 Fed. 30, that a defect in an answer in which distinct defenses were not separately stated was waived by demurring thereto on that ground. In the case at bar, plaintiffs' counsel, by denying in their reply the allegations of new matter in the answer, thereby waived any defect therein based on the ground alleged.

2. Besides, a defendant can be required to elect on which of several defenses he will rely only where the facts stated therein are so inconsistent that, if the truth of one defense be admitted, it will necessarily disprove another: *Pavey v. Pavey*, 30 Ohio St. 600; *Cox v. Cox*, 26 Pa. St. 375 (67 Am. Dec. 432). If it be admitted that the answer set out more than one defense, the averments therein are not so inconsistent as to compel an election.

3. Contracts are usually entered into with the tacit understanding of the parties that the ordinary methods of executing the terms of their agreement will be pursued: *Johnston v. Barrills*, 27 Or. 251 (41 Pac. 656, 50 Am. St. Rep. 717). Though by invoking this rule it might reasonably be inferred that the parties to this action understood that the bark in question would ordinarily be shipped down the Siuslaw River and bay to the Pacific Ocean, and thence to San Francisco, the interruption of navigation on any part of the way does not destroy the possibility of transporting the bark to its destination, for it might have been hauled in wagons from Mapleton to Eugene, a distance of about 80 miles, and thence carried by rail to San Francisco. The pos-

sibility of executing the contract in the manner last indicated demonstrates that the inability of a vessel to cross the Siuslaw bar, by reason of the storms that prevailed prior to and on October 1, 1903, when the bark should have been delivered in San Francisco, was not such a dispensation as would excuse defendants from performing the terms of their agreement, or exempt them from liability in an action instituted to recover the damages sustained by reason of their breach of the contract: *Pengra v. Wheeler*, 24 Or. 532 (34 Pac. 354, 21 L. R. A. 726); *Reid v. Alaska Packing Co.* 43 Or. 429 (73 Pac. 337); *Anderson v. Adams*, 43 Or. 621 (74 Pac. 215). The trial court evidently adopted this view, for, in charging the jury, they were told, in effect, that, unless the original contract stipulated that the inability to transport the bark by water would justify a violation of the agreement, the nonperformance of its terms by reason of the interruption of navigation afforded no defense to the action.

4. An examination of the answer will show that the principal fact therein stated to defeat a recovery against the defendants is the alleged modified agreement, whereby it is averred that plaintiffs were to accept two and one half tons of bark in lieu of the quantity stipulated for in the original contract. If the modification was consummated as alleged, the delivery of the bark, admitted to have been received, constituted a complete defense to the action. The statement of facts, preceding the averment of the modification, in relation to the condition of the bar at the entrance of the Siuslaw Bay, constitutes a history of the transaction which naturally precedes and logically leads up to the gravamen of the defense, forming mere matters of inducement that should be pleaded to enable the court to determine whether or not a prima facie case was presented; but the facts thus stated are not deemed material and need not be denied: *Gardner v. McWilliams*, 42 Or. 14 (69 Pac. 915).

5. Instead of ignoring the narrative constituting the alleged inducement, plaintiffs, in their reply, denied the statement thereof, and, over their objection and exception, testimony was introduced tending to show the condition of the Siuslaw bar, thus presenting to the jury an immaterial matter that was well calculated to divert their attention and possibly induce a verdict,

notwithstanding the court's instruction in relation to the alleged dispensation. The error of which plaintiffs complain in this respect thus seems to have been invited by their own pleading. If, however, the condition of the bar was alleged as tending to show an act of God, to excuse a performance of the terms of the agreement, the facts stated are insufficient to constitute a defense of that kind, and the answer should have been corrected in this respect by a seasonable application to the court for that purpose.

6. In view of the conclusion we have reached on another branch of the case, it has been deemed proper briefly to detail the state of the pleadings, so that, in case another trial is had, the jury may not possibly be misled in the manner indicated. Plaintiffs' counsel requested the court to charge the jury as follows:

"I instruct you that an attorney at law, in the absence of express authorization thereunto, has no authority whatever to compromise or settle a claim for his client. So, if you find from the evidence that the defendants wrote to Heller & Powers, then acting as plaintiffs' attorneys, offering less bark than that required by the contract in evidence, and that Heller & Powers replied thereto and undertook to accept the same, that does not bind the plaintiffs in this action as upon a compromise or settlement for such less amount of bark, unless you can find from the evidence the authority and power conferred upon Heller & Powers by the plaintiffs so to do."

The court having refused to give the instruction so requested, an exception was saved, and it is contended by plaintiffs' counsel that the action in this respect was erroneous. The bill of exceptions shows that, to enforce the payment of their claim for damages resulting from an alleged breach of the agreement, plaintiffs employed a firm of attorneys, to whom defendants wrote a letter, of which the following is a copy, to wit:

"Eugene, Oregon, October 21, 1903.

Messrs. Heller & Powers,
San Francisco, Cal.—

Dear Sirs:

We have just received your letter of the 17th sent to our Mapleton store. Now it seems to us that Messrs. Guggenheimer & Co. are a little hasty in this matter they turn over to you. We were acting in good faith with them, and they should do

the same with us, except they are looking for trouble. We have something over two and one half tons of bark for them and we may get some more. It has been turned over to the steamboat company to bring to S. F. last trip of str. 'Acme.' She had to go out almost empty on account of there not being water on the bar to float her out, and this is our only way of getting freight of this class to S. F. We wired the owners this morning from here, asking them when she would be back, and if they would take the bark. They answered she was not coming back until the bar got better, so that is how the matter stands. We will have a chance to ship it to Coos Bay, and from there to San Francisco in the course of two or three weeks. Now if Guggen-hime & Co. wishes to take the bark when it gets to S. F. we will ship it that way; on the other hand, if they won't take it, we will not ship it, and they can go on with their lawsuit, as we are not responsible for the acts of Providence. We have notified them from time to time during the summer just how matters stood. We have acted in good faith all through and have nothing to regret. Your proposition will not be accepted. We will do as we agreed to. If they can get the bark out of the Siu-law quicker than we can, let them go ahead and try it.

Yours, resp.,

Meyer & Kyle."

The defendants, in response to their communication, received the following answer:

"San Francisco, October 23, 1903.

Messrs. Meyer & Kyle,

Mapleton, Oregon—

Dear Sirs:

Yours of October 21, 1903, to hand and contents carefully noted. We are no more desirous of having any trouble over the matter referred to than you are; nevertheless, you must clearly see that your contract with Messrs. Guggen-hime & Co. has been broken. The act of Providence which you mention as having prevented your keeping your agreement, to have the bark in San Francisco by October 1, 1903, will not avail you very much as a defense in the event of an action.

You state, however, that you have a chance to ship two and one half tons of bark in the course of two or three weeks, and to show that we desire no lawsuit in the matter we will await this shipment before taking further steps. Failure on your part to make the shipment within the time specified will cause us to take the proceedings we have in contemplation. Kindly notify us promptly of shipment.

Yours very truly,

Heller & Powers."

In pursuance of this correspondence, defendants on November 25, 1903, shipped 5,216 pounds of cascara sagrada to San Francisco, which plaintiffs received and paid the contract price for on December 14th of that year. A perusal of these letters will show that it is possible to infer therefrom that the two and one half tons of bark were to be shipped in lieu of the quantity originally specified, for the defendants' letter states that, if plaintiffs will accept the bark, it will be sent, but, if they will not take it, the cascara sagrada will not be shipped, and Guggenhime & Co. can proceed with their action. The letter written by Heller & Powers states that, to show no lawsuit was desired, they would await the shipment before taking any further steps. A meeting of the minds as to the subject-matter might possibly be inferred from the correspondence, which is rather obscure in relation to any compromise; but, if an agreement was thereby consummated, it would be binding on plaintiffs only in case the agency of Heller & Powers was sufficient for that purpose. The defendants' offer having been accepted in San Francisco, the laws of California relating to the authority of an attorney must govern. The statute of that State, however, was not offered in evidence, and, for lack of such proof, the rules of the common law must control in determining the authority of Heller & Powers to bind plaintiffs by the alleged modified agreement. "As a general rule," say the editors of the *Cyclopedia of Law & Procedure* (4 Cyc. 945), "an attorney without special power is not authorized to compromise his client's claim. There is, however, no objection to giving an attorney special authority to compromise, and in rare instances the nature of the business may be such that a power to compromise will be implied, in which cases the act of the attorney in agreeing to the compromise would bind the client." Authority to compromise a claim, as mentioned in the exception noted, will be implied only in the regular course of pending suits and actions, when an attorney has neither time nor opportunity to consult with his client, whose interests would be imperiled by delay: *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63; *In re Heath's Will*, 83 Iowa, 215 (48 N. W. 1037); *Brockley v. Brockley*, 122 Pa. 1 (15 Atl. 646). The weight of authority in this country supports the rule that

an attorney, by virtue of a mere retainer, has no implied power to bind his client by a compromise of his claim: 3 Am. & Eng. Enc. Law (2 ed.), 358; *Barr v. Rader*, 31 Or. 225 (49 Pac. 962); *Huston v. Mitchell*, 14 Serg. & R. 307 (16 Am. Dec. 506); *Fitch v. Scott*, 3 How. (Miss.), 314 (34 Am. Dec. 86); *Holker v. Parker*, 7 Cranch, 435 (3 L. Ed. 396); *Preston v. Hill*, 50 Cal. 43 (19 Am. Rep. 647). No action between plaintiffs and defendants was pending when Heller & Powers wrote the letter of October 23, 1903, so that the necessity for speedy settlement did not exist. Besides, plaintiffs and their attorneys resided in San Francisco, and there was, in all probability, plenty of time and ample opportunity to confer with each other in relation to the proposed compromise.

The instruction requested stated the law applicable to the facts involved, and, for the refusal of the court to give it, the judgment is reversed and a new trial ordered.

REVERSED.

Decided 16 January, 1905.

BAKER COUNTY v. HUNTINGTON.

79 Pac. 187.

PAROL EVIDENCE TO SHOW PURPOSE OF WRITING.

1. Where the language of a written instrument is ambiguous, equivocal, or susceptible of conflicting interpretations, it is competent to ascertain by parol evidence the purpose and object of the parties from the surrounding circumstances, and thereafter to enforce it in accordance with such intention.

PAROL EVIDENCE SHOWING PURPOSE OF A BOND BY A SHERIFF.

2. Parol evidence is competent to show the circumstances connected with the giving of a bond by a public officer in order to determine its nature and effect, as, for example, that a certain bond filed by a sheriff, who was ex officio tax collector, was intended to cover his special liability for tax money, although it purported to be his ordinary official undertaking.

RECORDS OF COUNTY COURT CONCERNING OFFICIAL BONDS.

3. While the county court should keep a record of the delivery and acceptance of sheriffs' bonds, and should regularly approve the bonds, and enter the approval upon the minutes and file the undertakings with the clerk, an omission to do these things is not fatal to an enforcement of such a bond, where it is actually given and accepted.

PAROL EVIDENCE OF ACCEPTANCE OF OFFICIAL BONDS.

4. While the record of the county court is the best evidence of the delivery and acceptance of a sheriff's bond, yet, where the proper foundation is laid, such delivery and acceptance may be shown by secondary parol testimony.

OFFICIAL BONDS—DELIVERY WITHOUT CONSENT OF SURETIES.

5. Sureties upon an official bond regular upon its face, who, after affixing their signatures thereto, give it into the possession and control of the principal, clothe him with apparent authority to make final delivery to the obligee or proper authorities; and, if the principal delivers it contrary to

46	275
47	329
46	275
48	595
48	596

an understanding with the sureties that it shall not be delivered until other persons shall have become obligated, the sureties are estopped to deny the validity of the bond, unless the obligee has accepted it with notice, actual or constructive, of the real conditions under which it was intrusted to the principal.

DELIVERY OF OFFICIAL BOND—SUSPICIOUS CIRCUMSTANCES.

6. Where the obligee of an official bond knows of, or has notice sufficient to put a reasonably prudent man upon inquiry concerning, a violation of the condition under which it was delivered to the principal for final delivery, he cannot enforce it against the sureties.

IDEM.

7. In order that a defect on the face of an official bond shall operate as notice to the obligee of a condition affecting the right of the principal to deliver it, the defect must be one reasonably tending to cause a discovery of the real defect; otherwise there will not be imputed notice.

SEPARATE LIABILITY OF PRINCIPAL AND SURETIES THROUGH FAILURE OF PRINCIPAL TO SIGN THE BOND.

8. The sureties who have signed an official bond may render themselves liable though the principal has not signed the obligation.

SUSPICIOUS CIRCUMSTANCES APPARENT ON AN OFFICIAL BOND.

9. Where it appeared on the face of an official bond tendered for approval that the officer's name was not written in as the principal, that the name of only one of the six sureties who signed the instrument appeared in the body thereof, that the total of the amounts written after the names of the different sureties was only \$7,000, whereas the requirement was a bond of \$10,000, and two of the signing sureties had not justified, a reasonably prudent man would have inquired, and therefore the county was chargeable with constructive knowledge as to the authority of the officer to deliver the bond.

DEFECTIVE BONDS—PLEADING WANT OF AUTHORITY TO DELIVER.

10. An official bond fair on its face does not import notice of any agreement between the sureties and the principal concerning the delivery of such bond, and a defense based on such an agreement must be pleaded; but where the bond by its appearance puts the obligee on notice as to the authority to deliver, a defense of want of such authority need not be specially pleaded by the sureties.

APPEAL—SUFFICIENCY OF ASSIGNMENT OF ERROR.

11. An assignment of error that the trial court refuses to permit a sufficiently comprehensive cross-examination of appellant's witnesses relative to certain issues tendered by the pleadings, is sufficiently comprehensive, in an action on an official bond, the defense by the sureties being a delivery without authority, to present for review the question whether the bond was so defective on its face as to charge the obligee with knowledge of the actual authority of the principal as to delivery.

From Baker: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is an action by Baker County against A. H. Huntington and others to recover upon an obligation alleged to be the sheriff's additional bond as tax collector for Baker County. The instrument is in the following form:

"Whereas, at an election held on the 4th day of June, 1900, A. H. Huntington was duly elected sheriff of the county of Baker, State of Oregon, we, A. L. Brown, ——— and ——— hereby undertake that if the said A. H. Huntington shall not

pay over according to law all money that may come into his hands by virtue of such office, and otherwise well and faithfully perform the duties of such office, that we, or either of us, will pay to the State of Oregon the sum of Ten Thousand Dollars.

For \$1,000.00, A. L. Brown. [Seal.]

For \$2,000.00, James Fleetwood. [Seal.]

For \$1,000.00, D. Cartwright. [Seal.]

For \$1,000.00, Harry A. Duffy. [Seal.]

For \$1,000.00, J. T. Fyfer. [Seal.]

For \$1,000.00, J. W. Insenhofer. [Seal.]”

It appears from accompanying certificates that Duffy, Fyfer, Cartwright, and Insenhofer justified, but not so with Fleetwood and Brown. It is alleged that Huntington delivered the writing obligatory to the county court of Baker County as and for his additional bond as sheriff and ex officio tax collector of that county, and that the same was duly accepted by the court. Then follow allegations of the collection by Huntington of certain taxes, and defalcation for a larger sum than that named in the bond. All the defendants demurred jointly, except Duffy, who seems to have made no appearance, on the ground that the complaint does not state facts sufficient to constitute a cause of action, which demurrer being overruled, they answered, and, the judgment after trial being adverse, now prosecute this appeal.

REVERSED.

For appellants there was a brief and an oral argument by *Mr. William Smith*.

For respondent there was a brief over the names of *Thomas Gabbert Greene* and *White & Winfree*, with an oral argument by *Mr. Greene* and *Mr. Samuel White*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The first question presented, which arises both on the demurrer to the complaint and on the introduction of testimony touching the purpose of the instrument, is whether the bond can be construed or shown to have been given as the sheriff's additional bond to cover his duties and obligations as tax collector of the county. It is well settled in this State that prior to the act of 1901 (Laws 1901, p. 245) a sheriff's ordinary bond did not cover his special duties as tax collector, and therefore would not

answer for defalcations arising from a failure to pay over tax moneys collected by him in his official capacity: *Columbia County v. Massie*, 31 Or. 292 (48 Pac. 694); *Multnomah County v. Kelly*, 37 Or. 1 (60 Pac. 202). The official undertaking of a sheriff at the time the transactions herein involved were had was required to be given in a certain form prescribed by the statute, to be approved by the county court and filed with the clerk, in the execution whereof the sureties must have justified before the county court: Hill's Ann. Laws, §§ 2390, 2392, 2395. By Section 2793 the sheriff of each county was made the tax collector thereof, but by the succeeding section (2794) he was required, before entering upon the duties of collecting taxes, to execute an additional bond in such sum as the county court of the county might determine. There seems to be no special provision as to how or before whom the sureties shall justify, nor is there any direction that the bond shall have been approved by the county court or filed with the county clerk, as is the case with the undertaking first mentioned. The subject is treated of under a different title, and the provisions pertaining to the sheriff's ordinary undertaking are not made especially applicable to the execution of the additional bond. The practice, however, of following such provisions, would be a most wholesome one to adopt, and is probably the rule generally. Now, the bond in question is substantially in the statutory form of a sheriff's official undertaking, the word "faithfully" being omitted at one place, and presumptively it is his ordinary undertaking; but it is alleged to be his additional bond to insure the faithful performance of his duties as tax collector. Can this be shown by parol? If so, the action will lie; otherwise not. A sheriff is known by no other title while collecting taxes; such duties being additionally enjoined upon him, and are performed by virtue of his office as sheriff. In other words, he is made ex officio tax collector of his county, for the faithful performance of which ex officio duties he is required to give what the law denominates an additional bond. Nothing else is prescribed. No form and no special provisions are directed to be observed.

1. It is a rule of law that where the language of a written instrument is ambiguous, equivocal, or susceptible of conflicting

interpretations, it is competent to ascertain the intention of the parties thereto from the facts and circumstances which induced its execution, and thereafter to enforce it in accordance with such intention, and such facts and circumstances may be shown by parol. It is not the office of parol evidence in such case to alter the language of the instrument, but to ascertain and determine the purposes to which the parties intended to apply it. The rule is of application as it respects the subject-matter or thing about which the parties have dealt. It sometimes happens, for the purpose of ascertaining what was in the minds of the parties, that it is necessary to resort to extrinsic parol proof; and this may be done, not for the purpose of altering the terms of the writing by words of mouth passing at the time, but as a part of the conduct of the parties, in order to determine what was the scope and object of the intended contract, and to fill up the instrument where it is silent. "Having done that," says Mr. Bradner in his valuable work on Evidence (2 ed.), 274, "the court can turn to the language of the instrument to see if that language is capable of being construed so as to carry into effect that which appears to have been really the intent of both parties." See, also, *Heffield v. Meadows*, L. R. 4 C. P. 595; *Henry McShane Co. v. Padian* (Com. Pl.), 20 N. Y. Supp. 679.

2. The bond, by its terms, applies alike to the ordinary duties of a sheriff, and to his special duties as tax collector. They are both official duties, and the moneys coming into his hands in the latter capacity come by virtue of his office: *Murfree*, *Sheriffs*, §§ 46, 48, 51; *Lane v. Coos County*, 10 Or. 123. So that the expressions, "all money that may come into his hands by virtue of his office," and "otherwise well and faithfully perform the duties of such office," become equivocal and susceptible of different interpretations; and the case, it seems to us, is a proper one for solution by the admission of parol evidence to show the circumstances attending the transaction, and the subject-matter which the parties had in mind when they entered into the pending relationship. If it had been somehow written in the instrument, characterizing it as an additional bond, the application of the condition employed would have been rendered perfectly plain. They could not then have been applied to the

ordinary duties of a sheriff, simply because it would be an additional bond, and not the official bond of that officer. So it would have been if the bond had been given for the faithful payment of the money which might come into his hands by virtue of his office as ex officio tax collector, or for the performance of his duty in that capacity—there would be no room for interpretation; but in its present form the bond might just as well apply to one condition as to the other, and it needs only the evidence of the facts and circumstances under which it was executed to determine the intention of the parties, and thus to make the proper application. The complaint is therefore sufficient, and parol evidence was properly admitted of the circumstances and conditions under which it was executed, as tending to express the purposes for which it was given.

3. Another objection is made to parol proof of the delivery to and acceptance of the bond by the county court, it being maintained that such delivery and acceptance can only be shown by the record of the court. Unquestionably a court should keep a record of all such transactions, and should regularly approve all bonds, and have its approval entered upon the minutes and the undertakings filed with the clerk; but an omission to do these things, or a part of them, is not fatal to an enforcement of the obligation, if actually given and accepted.

4. In the absence of a record of the transaction, it is competent to show what was done by parol. The record is considered the best evidence, if it exists, and parol testimony is secondary; and, as preliminary to the introduction of the latter, a proper foundation should first be laid therefor, but when laid, such testimony is competent: *Stout v. Yamhill County*, 31 Or. 314 (51 Pac. 442). This was a case against a county, but the rule is applicable in either alternative: *Tiedeman, Munic. Corp.* § 108. The objection is therefore not well assigned.

Other questions arise upon the refusal of the court to permit defendants' counsel to cross-examine plaintiff's witnesses touching the delivery by the defendants to plaintiff, and acceptance by it, of the bond in question, or to permit defendants to offer original evidence upon the subject, and its refusal also to permit

defendants to explain the purposes for which the bond was executed. It follows, naturally, as a corollary from what has been said, that defendants were entitled to the privilege of showing by parol the purpose for which the bond was executed. This is what plaintiff's counsel is contending for upon its part, and, if it is proper for it to show by the attendant circumstances and conditions the object intended to be subserved by the parties to the instrument, it was equally competent for defendants to testify upon the same subject, and to show, if such was the case, that the bond was not executed for the purposes as alleged by the plaintiff. As to whether the undertaking in question was an additional bond, there is the allegation on the part of the plaintiff that it was so given. This is denied by defendants, and raises the issue. Any proof that the writing was given as a sheriff's ordinary bond would refute the allegation, and was proper to be admitted. It was error, therefore, not to allow it.

5. Upon the first mentioned question, it seems to be the theory of counsel for plaintiff that, under the conditions appearing, the sureties made Huntington their agent for the delivery of the bond in question, and are now estopped by his acts to show the contrary. Recurring again to the pleadings, it will be seen that plaintiff has alleged that the defendants, as sureties, made and executed the bond in question, and delivered it to Huntington, and that Huntington on the 5th day of December delivered the same to the county court for Baker County, and that said body accepted it as their obligation for the purposes stated. This was denied by the answer of the sureties, which presented two issues: First, whether the bond was in fact fully executed by the sureties and delivered to Huntington; and, second, whether Huntington delivered the same to the county court as their bond, and also whether it was accepted as such by plaintiff. Plaintiff had the laboring oar and it was incumbent upon it to substantiate the affirmative of these issues or fail. Huntington must have been clothed with authority from the sureties, real or apparent, to deliver the bond, as a completed instrument, or his disposition of it could not bind them. Plaintiff relies upon his apparent authority, evidenced by having the bond in his possession, and dealing with it as if he was empowered to make the delivery, and

thereby consummate the obligation, as between the sureties and the county. The rule of law is well settled that the sureties upon an official bond, regular upon its face, by the act of intrusting its possession and control with the principal after having affixed their signatures thereto, clothe him with apparent authority to make the final delivery to the obligee or the proper authorities whose function it is to accept it on the part of the public; and if, under such conditions, the principal deliver it contrary to an agreement or understanding that other persons should also have become obligated, the sureties are nevertheless bound, on the principle of estoppel, as having by their acts misled the obligee to his detriment, unless the obligee has accepted the obligation with notice, actual or constructive, of the real conditions under which the bond was primarily intrusted to the principal: *Dair v. United States*, 83 U. S. (16 Wall.) 1 (21 L. Ed. 491); *King County v. Ferry*, 5 Wash. 536 (32 Pac. 538, 19 L. R. A. 500, 34 Am. St. Rep. 880); *Cutler v. Roberts*, 7 Neb. 4 (29 Am. Rep. 4); *State v. Peck*, 53 Me. 284. It was said in the last case cited (the court quoting from Chancellor Kent) that "whoever deals with an agent constituted for a special purpose deals at his peril, when the agent passes the precise limits of his power, though, if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power." Such is almost the universal holding of the later American cases, and the doctrine is now too firmly established to admit of cavil or debate. See further, *Mechem, Public Officers*, § 279; *Smith v. Board of Supervisors*, 59 Ill. 412; *Chicago v. Gage*, 95 Ill. 593 (35 Am. Rep. 182); *Ward v. Churn*, 18 Grat. 801 (98 Am. Dec. 749).

6. If, however, upon the other hand, "the person seeking the enforcement of the bond knew, or had, either from the face of the bond or from any other source, notice sufficient to have put him, as a reasonably prudent man, upon inquiry which would have disclosed the facts, he cannot enforce it against the sureties in violation of the condition": *Mechem, Public Officers*, § 279. So, it was said in *Ward v. Churn*, 18 Grat. 801 (98 Am. Dec. 749): "But the rights of the obligors are several and distinct,

and neither is bound except so far as he has consented to be. Neither is bound without a delivery of the instrument, and one obligor has no right to deliver it for another without his authority. And besides, the obligee who receives the instrument from one of the obligors, which is apparently perfect, has a right to presume that all the obligors have authorized its delivery, but he has not the same right to make that presumption when the instrument, on its face, is incomplete and imperfect." In *King County v. Ferry*, 5 Wash. 536 (19 L. R. A. 500, 34 Am. St. Rep. 880, 32 Pac. 538), this principle is considered by the learned chief justice, where he reviews a number of authorities to the same purpose. He says: "Of course, if there is anything on the face of the bond when it is delivered to excite the suspicion of the obligee that the bond has been tampered with, or sufficient to put a prudent person on his guard, he ought to be held bound to make an investigation before accepting the bond." So, in *Murfree*, Official Bonds (section 53), the author says: "It is the duty of officers intrusted with the authority to take and approve official bonds to use ordinary care and prudence to protect the security, as well as to see, in the interest of the public, that the bond is valid and the securities sufficient. Whenever such facts occur as should put the officer upon inquiry as to the due and legal execution of a bond, he must make that inquiry."

In conformity with the rule thus ascertained and promulgated, a surety who signed an appeal bond and intrusted it to the principal on condition that it should also be signed by another, whose name appeared in the body of the bond as co-surety, the principal not having procured such additional signature, and having erased the name from the body, which erasure appeared upon the face of the instrument, it was held that the surety was not liable, on the ground that the obligee was put upon his inquiry: *Allen v. Marney*, 165 Ind. 398 (32 Am. Rep. 73). So, in *Nagle v. Stroh*, 4 Watts, 124 (28 Am. Dec. 695), where the bond contained in the body the names of two sureties, but was signed by one only, it was held that the obligee could not enforce it unless he was able to show that the surety signing it, knowing the other had not so signed, had agreed to become liable alone. So, the court say in *Dair v. United States*, 83 U. S. (16 Wall.) 1 (21 L. Ed.

491), where the principal rule is announced and applied: "If the name of Joseph Cloud appeared as a co-surety on the face of this bond, the estoppel would not apply, for the reason that the incompleteness of the instrument would have been brought to the notice of the agent of the government, who would have been put on inquiry to ascertain why Cloud did not execute it, and the pursuit of this inquiry would have disclosed to him the exact condition of things." Many cases announce a like principle: *McCramer v. Thompson*, 21 Iowa, 244; *State v. Craig*, 58 Iowa, 238 (12 N. W. 301); *Hagler v. State*, 31 Neb. 144 (47 N. W. 692, 28 Am. St. Rep. 514); *Fletcher v. Austin*, 11 Vt. 447 (34 Am. Dec. 698); *Ward v. Churn*, 18 Grat. 801 (98 Am. Dec. 749).

7. It goes without saying that a defect appearing on the face of a bond must be of such a nature as might reasonably lead to notice of the real defect complained of; otherwise it could not serve to impute notice: *Chicago v. Gage*, 95 Ill. 618 (35 Am. Rep. 182). So the court held in that case that the mere fact that the obligee in the bond had knowledge at the time he received it that there were blanks in the instrument, which had been filled in subsequent to the signing of the sureties, and in their absence, did not impute to such obligee notice of any secret conditions upon which the sureties may have signed.

8. The case at bar, however, presents a very different state of affairs. It is apparent from a glance at the bond in question that the name of the principal was neither incorporated in it, nor affixed to the instrument in a manner indicating that it was intended that he should be bound thereby. This in itself is not a serious objection, however, for the reason that it was competent for the sureties to bind themselves without joining the principal: *St. Louis Brewing Assoc. v. Hayes*, 97 Fed. 859 (38 C. C. A. 449).

9. It was a matter, nevertheless, that was proper to be considered in connection with all the other conditions appearing upon the face of the instrument, apposite to impute notice to the county that it was not a completed instrument, and that Huntington was not authorized to deliver it to become effective as against the sureties who had then affixed their signatures. Beyond this, these things were also at once manifest from a

mere inspection: First, that only one name of the six sureties signing was written in the body of the instrument; second, that the minutes or entries made opposite the signatures of the sureties showed that they had signed in the aggregate for only \$7,000, whereas the bond called for \$10,000; and, third, that two of the sureties signing had not as yet justified as is usual in such cases. These infirmities upon the face of the instrument were ample to have put the county upon inquiry as to Huntington's authority from the sureties to deliver it as a completed obligation for the purposes alleged, and the question of estoppel has no place in the inquiry. It thus became a question of fact for the jury to determine from the evidence whether, in reality, Huntington was given authority—not whether he had apparent authority, as the bond on its face refutes that—from the sureties signing to deliver this bond to the county court as their act and deed.

10. In this view, it is not an insuperable objection that the defendants had not pleaded that the plaintiff took the bond with knowledge or notice of an understanding between the sureties and the sheriff that it should not have been delivered until others had signed. If, however, the bond had been fair on its face, imparting no notice to excite inquiry that, if followed up, would have led to information of an adverse understanding between the sureties and the principal, then most assuredly there should have been an affirmative defense showing that notwithstanding the bond imparted no notice, yet that in fact an infirmity as to the apparent authority of the principal really existed, of which the county court had extraneous notice and knowledge, and hence that it could not insist upon any binding effect of the undertaking as against the sureties.

11. Another question is suggested, which is that the plaintiff made no offer in connection with the questions put to Cartwright showing what was expected to be proven by the witness, and therefore that the error is not well assigned; but, if this be conceded, the questions last discussed are sufficiently presented by the refusal to permit defendants a full cross-examination of plaintiff's witnesses relative to the issues under the pleadings, seeing that the case was tried upon an erroneous theory.

The judgment of the circuit court will be reversed, and the cause remanded for such further proceedings as may seem proper.

REVERSED.

Argued 31 January, decided 27 March, 1905.

THORNBURG v. GUTTRIDGE.

80 Pac. 100.

APPEALABLE ORDER—ENTERING FINDINGS.

1. An order entering findings of fact and a conclusion that one of the parties is entitled to a certain judgment is not a final order under Section 547 of B. & C. Comp.

ACTION BY COURT SUA SPONTE—DISMISSING APPEAL.

2. Where it appears that the court has not jurisdiction over a cause, *as*, because the appeal has been taken from an intermediate order, it should dismiss the proceeding on its own motion, though the objection is not urged.

From Grant: MORTON D. CLIFFORD, Judge.

Proceedings supplementary to execution by Grant Thornburg against G. H. Guttridge. From a judgment for plaintiff, defendant appeals.

DISMISSED.

For appellant there was a brief and an oral argument by *Mr. A. D. Leedy*.

For respondent there was a brief and an oral argument by *Mr. Patrick J. Bannon*.

PER CURIAM. 1. This appeal is from certain findings of fact and a conclusion of law rendered in a proceeding supplementary to execution, upon which no final order or judgment was ever given or entered. For a sufficient statement of the facts, see *State ex rel. v. Guttridge*, 46 Or. 215 (80 Pac. 98), where they are set out and their effect determined. The appeal is prosecuted by the defendant, but it cannot be maintained, because not from a final order affecting a substantial right: B. & C. Comp. § 547. The circuit court did not proceed far enough. It has made its findings, but has omitted the essential feature that affords the requisite basis for an appeal, namely, the judgment or final order. While the proceeding is thus suspended, no appeal will lie.

2. The point was not made at the hearing, nor was a dismissal of the appeal urged on account of it, but is so apparent from a

mere inspection of the record that this court will direct a dismissal upon its own motion.

An order will therefore be entered accordingly.

APPEAL DISMISSED.

Argued 15 March, decided 28 April, rehearing denied 29 May, 1905.

STATE v. WILLIAMS.

80 Pac. 655.

HOMICIDE—KIND OF PROOF OF CORPUS DELICTI REQUIRED.*

The death of the person alleged to have been killed is a necessary element in a prosecution for homicide, and must be established either by direct testimony or by circumstantial evidence of the most convincing nature. No general rule as to sufficiency can be stated, except that the best evidence obtainable should be produced, each case being dependent upon its particular circumstances.

From Wasco: W. L. BRADSHAW, Judge.

Norman Williams, informed against as Daniel Norman Williams, was convicted of murder, and appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Henry E. McGinn*.

For the State there was a brief and an oral argument by *Mr. Andrew M. Crawford*, Attorney General, *Mr. Frank Menefee*, District Attorney, and *Mr. Fred W. Wilson*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an appeal from a judgment of death against the defendant for the murder of Alma Nesbitt. The only question is whether there was sufficient proof on the trial that she is dead. No evidence was offered by the defense. The facts, as shown by the prosecution, are that in May, 1899, Miss Nesbitt left her home and relatives in Iowa, and came, a stranger, to Oregon, with the defendant, to whom she was then engaged, with the avowed purpose of taking up a homestead adjoining the one belonging to him, with the understanding that they each should obtain title to their land, and then be married, thus consolidating the two homesteads. Arriving in Oregon about the last of May, Miss Nesbitt settled upon 160 acres of land adjoining that occupied by Williams in the mountains about 20 miles from Hood

*NOTE.—See extended collection of authorities in 68 L. R. A. 33-80, under the title, Proof of Corpus Delicti in Criminal Cases, with a note on the same subject in 91 Am. St. Rep. 24.

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River, and he built, or caused to be built, for her a house thereon. She made her filing on the 10th of June, and, after remaining on the place a short time, went away, probably to Portland, where she remained until the 25th of July, when she and Williams were married at Vancouver, in the State of Washington. This marriage was kept secret, and not made known to the neighbors of the contracting parties, or to Miss Nesbitt's relatives. Soon thereafter she went to The Dalles, and worked as a domestic, until early in October, when her mother, who was then about 69 years of age, came from Iowa to live with her daughter on her homestead. Williams met them at Hood River, and took them out to the place, where they remained during the winter, living a part of the time on Miss Nesbitt's homestead and a part on Williams', until the 7th of February, 1900, when the two women went to Portland for some purpose, and took rooms at the Winters lodging house on the east side. About the 6th of March, Williams, who was working at a sawmill five or six miles from his homestead, hired a man to drive his team for a few days, saying that he had important business at The Dalles. He went to Portland, however, and had an interview with Miss Nesbitt and her mother at the rooming house, concerning her homestead. The proprietor of the house, who overheard the conversation, or a part of it, testified that he could not recall the exact words used, but it was either that Williams wanted to buy Miss Nesbitt's homestead, or some one was about to jump it. At all events, the three parties left the rooming house together, probably as a result of this conversation, on Thursday, the 8th of March. They were next seen at Hood River soon after the arrival of the train from Portland on that day, where Williams applied to a livery stable for a span of horses and a wagon, to take, as he said, some passengers to his homestead that night. As the night was dark and stormy, and the roads heavy, the livery stable proprietor hesitated to send a team out for such a trip, and suggested to Williams that he wait until morning; but he said it was absolutely necessary for him to go that night, and arrangements were thereupon made for the team. Williams started with the two women in the wagon about 7.30 in the evening, declining to take a lantern or carriage lamp, although the

night was dark. He returned to Hood River about 8 o'clock next morning, without the women, and neither of them has been seen or heard of since. The team was covered with mud, and in answer to questions from the owner Williams said that he arrived at his homestead about 1 o'clock in the night and remained until about 3. After paying the bill he went to another livery stable in the town, hired a horse, and rode out to Leasure's place, about six miles from his homestead, where he left the horse, with directions to send it back next day by the mail carrier, and went on to his homestead, and remained until the following Monday, when he resumed the work at the sawmill in which he was engaged before going to Portland. He continued such work for a day or two, and then returned to his homestead, taking his team and a load of sacked oats or grain.

On June 23d following he filed in the United States Land Office an application to amend his homestead entry so as to include a part of the land embraced in that of Miss Nesbitt, accompanying it by what purported to be a relinquishment by her of her homestead, dated the same day, the signature to which, however, was forged by him. The land department, without knowledge of this forgery, and supposing the paper to be genuine, permitted him to amend his homestead entry, and he continued to live on the claim until some time in the fall or winter of 1900-1901, when he left the neighborhood, and was soon thereafter living at Bellingham Bay, Wash., with a woman he claimed to be his wife, and had with him a young woman whom he introduced to his neighbors as Miss Nesbitt, but whom the testimony shows to have been another person. From the time Miss Nesbitt and her mother arrived in Oregon up to the time of their disappearance they had been in the habit of writing regularly to their relatives in Iowa and Nebraska as often as once or twice in every week or 10 days. Their mysterious and unexplained disappearance, as well as the cessation of these letters, naturally created great uneasiness among their relatives, and speculation by Williams' neighbors. Inquiry and search were thereupon made to ascertain their whereabouts, if possible. As was natural, inquiry was made of Williams. He made many inconsistent, contradictory, and false statements in regard to the matter. To

one of the witnesses he said that he had received a letter from Miss Nesbitt after the time of her disappearance, and put his hand into his pocket as if to produce it, but suddenly discovered that he had left it in the pocket of another garment. To other witnesses he said that he did not know of her whereabouts, and that the last time he saw her or her mother was when he put them aboard the train at Hood River on the morning he returned the team to the livery stable, although the train passed that station two or three hours before his return to town. To others he said that the last time he saw either of the women was on the 28th of January, 1900, when they left the homestead with a man by the name of Edmunds or Edwards. To the United States District Attorney, after he was indicted for forging Miss Nesbitt's name to the homestead relinquishment, he produced what purported to be a clipping from a newspaper containing a notice of the marriage of a Miss Alma Nesbitt to a W. H. Edwards at North Yakima, Rev. Mr. Griggs officiating. The testimony of the county clerk and postmaster at North Yakima showed that there was no record at that place of such a marriage, and that no such persons as the alleged contracting parties or officiating clergyman were known in that community. In a letter written in August, 1900, by the defendant, in answer to one from Mrs. Swift, a sister of Miss Nesbitt, he intimated that she was immoral, and had clandestinely gone away with another man, and suggested that further search for her and her mother be discontinued; for "as long as we keep trying to find them they are bound to keep quiet, and I know now that there is nothing happened to them, so I shall spend no more money, or time either, for I know she has left me for good." In this same letter he inquired if there had not been trouble between Miss Nesbitt and her sister, saying that she and her mother had both told him that they would never write to Mrs. Swift again, or tell her anything. In the spring of 1901 he suggested to one of his neighbors, in a conversation concerning the disappearance of the two women, and the suspicion against him on that account, that "you and Doc Riggs can straighten this matter up for me if you will, and set everything right about it, and we could make everything

right. If you and Doc Riggs could say you saw me taking these women to town, that would settle this matter, and straighten it up for me."

The relatives of Miss Nesbitt and her mother being unable to obtain any satisfactory information by correspondence as to their disappearance or whereabouts, Mr. George R. Nesbitt, a son and brother, came to Oregon in February, 1904, and went out to Williams' homestead to make a personal examination of the surroundings. After an investigation, he and his companion noticed a depression in the ground in a building used as a hen-house about 30 feet distant from the dwelling on the Williams claim. On digging they discovered an excavation about six feet long by three feet wide and about six feet deep, which had been filled up at some time. Upon throwing out the dirt they found in the bottom a lot of gunny sacks, which had been soaked with some liquid, and two tufts of hair about eight or ten inches long, one very fine and partly gray and the other black, matted together, as if clotted with blood. The gunny sacks and hair were examined by an expert chemist, who testified that the sacks had been saturated with human blood, and that the hair was human hair, and that the black hair had been removed from the scalp before death. Mr. Nesbitt identified the fine gray hair as that of his mother, and a woman who lived near the Williams homestead, and who saw much of the two women during the winter they lived on the claim, also testified that she had combed the old lady's hair many times, and believed it to have belonged to her. When Williams was asked to explain the matter of the excavation and the finding of the hair, he said that the excavation was formerly used for a water-closet, but that he had moved the closet and filled it up; that before doing so he had thrown into it some gunny sacks used as bedding for his mares when foaling that spring, and some bits of dogskin containing hair, which he had used as housing for his harness. These statements were shown to be false, not only by the testimony of the expert as to character of the blood on the gunny sacks and the hair, but by the testimony that one of the mares had her colt at a mill some six miles distant from his homestead, and the other after the water-closet had been moved and the excavation

filled up, if that had ever been done. No skin or hide of any kind was found in the hole or excavation, and the hair found therein was eight to ten inches long, so that it could hardly have been dog's hair, as claimed by the defendant; and, moreover, parties who were familiar with Williams' team and harness testified that they never knew of his using any dogskin in connection therewith. On March 14, 1900, about six days after the disappearance of Miss Nesbitt and her mother, a surveying party was at Williams' house for dinner. He was at that time engaged in building the chicken house in which the excavation was afterwards discovered. Covering the exact spot where the excavation was found was a pile of sacked grain, although it was thus exposed to the weather, and there was plenty of room in the shed adjoining his house for its storage. In the spring of 1900 Williams had some land cleared near his house. The brush from it was piled up and burned during the summer, and it is suggested that, becoming alarmed at the search that was being made for the missing women, he removed their bodies from the excavation, and burned them in the brush fire.

The rule at one time seems to have prevailed that a conviction for murder or manslaughter could not be sustained without direct proof of the killing, unless the body of the supposed victim had been found: 2 Hale, P. C. 290; Starkie, Evidence (10 ed.), *862; Wills, Circum. Ev. p. 206; 7 Am. & Eng. Enc. Law (2 ed.), 862. So strict was this rule observed that it is said that on a trial for murder by a mother and the reputed father of a bastard child, which the proof showed they stripped and threw into the harbor of a seaport town, the court directed an acquittal on the ground that, as the tide of the sea flowed and reflowed into and out of the harbor, it might possibly have carried out the living child: Garrow, *arguendo*, in *Hindmarsh's Case*, 2 Leach, C. C. 571. In another case a mother was indicted for the murder of her illegitimate child. It had been sent to a nurse's, where it remained for a time, when the prisoner took it away, stating an intention of going to her father's. She was seen with the child next day as late as 6 o'clock, going in the direction of her father's house. Between 8 and 9 o'clock she arrived at the house without the child. The body was never found, and the court directed an

acquittal: *Regina v. Hopkins*, 8 C. & P. 591. The cook of a schooner was indicted for the murder of the captain upon Long Island Sound and throwing his body overboard. Some months later a body floated upon the shore, which the prosecution claimed was shown to be that of the murdered man. The court charged the jury that, inasmuch as the supposed tragedy was near the shore, and there was strong reason to suppose that, if the murder had been committed, the body would be discovered, they must be satisfied that the body produced was that of the murdered captain before they could convict the prisoner: *People v. Wilson*, 3 Parker, Cr. R. 199, 207. In *Ruloff v. People*, 18 N. Y. 179, the defendant was indicted for the murder of his infant child, and circumstances pointed strongly to his guilt, but the court held that he could not be convicted, inasmuch as the body of the child had never been found. The opinions in this case in the supreme court (3 Parker, Cr. R. 401), where it was held that a conviction could be had without the production of the body, and those on appeal (18 N. Y. 179), reversing the judgment, contain an exhaustive consideration of the rule as to the proof of the corpus delicti under the decisions as they then stood. The doctrine of the cases requiring the production of the body of the person alleged to have been murdered is based upon the statement of Lord HALE in 2 Hale, P. C. 290, that "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead." This statement was made at a time when a prisoner charged with a felony was not accorded the right to testify in his own behalf, the advantage of sworn witnesses, or the full aid of counsel; and Mr. Best thinks the statement too broad, and that the principle laid down must be taken with considerable limitations: Best, Evidence, § 441. And such language was afterwards stated by an English judge to have been by way of caution, rather than as laying down an absolute rule of law: *Regina v. Button*, Dearsly, C. C. 282, 284.

To require direct proof of the killing or the production of the body of the alleged victim in all cases of homicide would be manifestly unreasonable, and lead to absurdity and injustice; and it is believed that it is now clearly established by the authorities

that the fact of the death as well as the guilt of the defendant may be legally inferred from such strong and unequivocal circumstances as produce conviction to a moral certainty. Mr. Greenleaf says: "The proof of the charge in criminal causes involves the proof of two distinct propositions: First, that the act itself was done; and secondly, that it was done by the person charged, and by none other—in other words, proof of the *corpus delicti* and of the identity of the prisoner. It is seldom that either of these can be proved by direct testimony, and therefore the fact may lawfully be established by circumstantial evidence, provided it be satisfactory. Even in the case of homicide, though ordinarily there ought to be the testimony of persons who have seen and identified the body, yet this is not indispensably necessary in cases where the proof of the death is so strong and intense as to produce the full assurance of moral certainty. But it must not be forgotten that the books furnish deplorable cases of the conviction of innocent persons from the want of sufficiently certain proofs either of the *corpus delicti* or of the identity of the prisoner. It is obvious that on this point no precise rule can be laid down, except that the evidence 'ought to be strong and cogent,' and that innocence should be presumed until the case is proved against the prisoner, in all its material circumstances, beyond any reasonable doubt": 3 Greenleaf, Evidence (16 ed.), § 30. Mr. Kerr, in his work on Homicide, says: "The general rule, however, is that the *corpus delicti*, taken as a whole, may be shown by any evidence which satisfies the jury beyond a reasonable doubt, whether it be direct or circumstantial; but this is qualified and limited by the rule that the defendant's confession, taken alone and without corroborating proof of the *corpus delicti*, is not sufficient to support a conviction": Kerr, Homicide, § 493. Mr. Bishop, in commenting on the rule which formerly prevailed that there could be no conviction in homicide cases without direct proof of the death, says: "It is perceived that the only service it could ever do was to cover up those blunderings of justice which were apt to come to the public gaze; for if one was wrongly convicted through a blunder in any other part of the case than the *corpus delicti*, it would seldom become known; hence the like rule was not applied to such a case"; and

that "circumstantial evidence is admissible to the corpus delicti, the same as to the other parts of the case, and the jury may find a verdict of guilty solely upon it, equally in murder and in all other crimes": Bishop, New Crim. Proced. §§ 1056, 1057. Mr. Best, in his work on Evidence (section 446), remarks: "Whether it is competent, even in extreme cases, to prove the basis of the corpus delicti by presumptive evidence, has been questioned. But it seems a startling thing to proclaim to every murderer that, in order to secure immunity to himself, he has nothing to do but consume or decompose the body by fire, or lime, or to sink it in an unfathomable part of the sea. Unsuccessful attempts of this kind are known to have been made, and successful ones may have remained undiscovered."

Mr. Justice STORY, in *United States v. Gilbert*, 2 Sumn. 19 (Fed. Cas. No. 15,204), in speaking of the rule that there ought to be no conviction for murder unless the murdered body is found, says that it "certainly cannot be admitted as correct in point of common reason or of law, unless courts of justice are to establish a positive rule to screen persons from punishment who may be guilty of the most flagitious crimes." In a most copious and extensive note to *State v. Williams* (N. C.), 78 Am. Dec. 253, it is said by the learned editors of that work, after a reference to the rule that direct and positive evidence is not necessary to prove the corpus delicti, and the authorities in support thereof, that: "This rule is now clearly established, and it would be most unreasonable to always require direct and positive evidence. Crimes, especially those of the worst kind, are naturally committed at chosen times, in darkness and secrecy. Human tribunals must therefore act upon such indications as the circumstances of the case present or admit, or society must be broken up. The cases just cited show that the jury may find a verdict of guilty upon circumstantial evidence, and that the corpus delicti may be proved by such evidence, as well as any other part of the case, and that this rule applies in cases of murder and manslaughter, as well as in all other crimes. But a few courts have, by refined distinctions, qualified this doctrine slightly. Thus, in New York it was laid down, in the first instance by a divided bench, that in murder either the death or

the criminal agency producing it must be proved by direct evidence; then the other may be proved by circumstantial evidence: *Ruloff v. People*, 18 N. Y. 179. The same thing was held as to the crime of murder or manslaughter in *People v. Bennett*, 49 N. Y. 137, but the court was divided. The better rule, however, is that either element of the corpus delicti or both may be proved by circumstantial evidence, and this is the one sustained by the weight of authority as shown by the cases above cited. But circumstantial evidence should be acted upon with great caution, especially where the public anxiety for the detection of a great crime creates an unusual tendency to exaggerate facts and draw rash inferences (*Pitts v. State*, 43 Miss. 472), because of all the various sources of error one of the most copious and fatal is an unreflecting faith in human testimony." The truth of this latter statement is shown by the instances cited by Mr. Justice MASON in his opinion in *People v. Ruloff*, 3 Parker, Cr. R. 401.

To the doctrine of these cases and the rule thus stated we give our assent. The strict rule contended for by defendant would operate completely to shield a criminal from punishment for the most atrocious crime, and afford him absolute immunity if he were cunning enough to consume or destroy the body of his victim by fire or some chemical agency, or completely hide it away or otherwise destroy its identity, although the proof of his guilt might be of the most clear and convincing kind, and remove all possible doubt in the premises. The death of the person alleged to have been killed is a distinct ingredient in the case of the prosecution for murder or manslaughter, and must be established by direct testimony or presumptive evidence of the most cogent and irresistible kind. Great care in such a case should always be observed in acting upon presumptive or circumstantial evidence. No conviction should be had or allowed to stand on mere suspicion or conjecture alone. Whether the law will in any case permit a conviction for murder where no supposed remains or part of the remains of the person alleged to have been murdered have been found and there is no evidence of the body having been consumed by fire, chemicals, or the like, is not necessary for us to consider at this time. Where, as here,

the entire circumstances point with one accord to the death of the person alleged to have been murdered, the finding of fragments of a human body or of metallic articles which are positively identified as part of the body of the alleged victim, or as articles worn by him, will be sufficient, if believed by the jury, to establish the fact of death, when this is the best evidence that can be obtained under the circumstances: *People v. Alviso*, 55 Cal. 230; *McCulloch v. State*, 48 Ind. 109; *Commonwealth v. Webster*, 5 Cush. 295 (52 Am. Dec. 711); *State v. Williams*, 52 N. C. 446 (78 Am. Dec. 248); *Gray v. Commonwealth*, 101 Pa. 380 (47 Am. Rep. 733). No universal and unvariable rule can be laid down in regard to the proof of the corpus delicti. Each case depends upon its own peculiar circumstances. The body of the crime may be proved by the best evidence which is capable of being adduced, if it is sufficient for the purpose. Such an amount of accompanying or relative facts, whether direct or circumstantial, must be produced as establish the fact beyond a moral certainty, and to the exclusion of every other reasonable hypothesis. There was sufficient evidence, without commenting upon it, in the case at bar, in our opinion, to establish the death of the alleged victim within the rules of law referred to.

AFFIRMED.

Decided 27 March, rehearing denied 3 July, 1905.

VIOHL v. NORTH PACIFIC LUMBER CO.

80 Pac. 112.

MASTER AND SERVANT—INJURY—FAILURE TO RECALL DANGER—CONTRIBUTORY NEGLIGENCE.

1. Where a servant is suddenly called upon to perform a service requiring prompt and energetic action he cannot as a matter of law be charged with contributory negligence in failing to remember a defect in the machinery he must handle, or a particular danger connected with the work, even though he may previously have known of them.

IDEM.

2. The fact that a servant has knowledge of a danger is not conclusive of negligence in failing to avoid it, but that fact imports negligence only when the danger was of such a character that a man of ordinary prudence and caution would have refused to incur it in the performance of his duties.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by Henry Viohl against the North Pacific Lumber Company. From a judgment for defendant, plaintiff appeals.

REVERSED.

46 297
147 437

For appellant there was a brief over the name of *Chamberlain & Thomas*, with an oral argument by *Mr. Warren E. Thomas*.

For respondent there was a brief over the names of *William D. Fenton* and *Rufus A. Leiter*, with an oral argument by *Mr. Leiter*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is a personal injury action. The plaintiff, while working for the defendant in its sawmill, was caught in a cogwheel gearing and injured. He brought this action to recover damages, alleging that defendant was negligent, among other things, in allowing the lower part of the cogwheels to be uncovered, and in ordering and directing him to work in close proximity thereto while they were in such condition, without cautioning or warning him of the danger. The defense is a denial of negligence, and a plea of assumption of risk and contributory negligence. On the trial the plaintiff was nonsuited, and he appeals.

The facts, so far as necessary for the present purposes, are as follows: The plaintiff at the time of the injury was about 21 years old, and had been at work for defendant about six weeks. He had had no previous experience in sawmills, and but little, if any, at work in or about machinery. He was not employed for any particular purpose, but was a common laborer in the mill, and was first put to work behind the edger, off-bearing. Four or five feet from the place where he was thus required to work was a set of live rolls, extending through the mill, and past the place where he was working, which were used in carrying lumber from the main saw to the edger, and slabs to the cut-off saw, further on. These rolls were driven by a long shaft, upon which were placed at intervals cogwheels which meshed into similar wheels on the ends of the rolls. One set of these cogwheels was about opposite, or perhaps a little behind, the place where the off-bearer from the edger was required to stand while at work. The top of these wheels was covered by an iron casting, but the lower part was uncovered, and about 10 inches from the floor. Between the apron or table of the edger and the line of rolls referred to were skids, upon which the off-bearers from the edger threw the slabs and trimmings, which were then taken up by

other persons and thrown across the line of rolls to the slasher or slab saw. The plaintiff, when first employed, worked behind the edger, off-bearing, for seven or eight days, standing four or five feet from the cogs in question. He was then put to work elsewhere in the mill for a time, and then back to the edger for another three or four days. From that time until the day of the accident he worked at various places in the mill, as directed, but not at the edger. On the morning of the accident he was put to work at the cut-off saw, and while so working the slasher broke down and remained idle for about half an hour. The edger continued operation, however, and slabs and trimmings from it accumulated on the skids and rolls, covering the cogwheels referred to. After the slasher had been repaired, plaintiff was ordered by the foreman to leave his work at the cut-off saw, and assist some other employees in removing and clearing them away. While so engaged his foot slipped, and his heel caught in the cogwheels and was injured. These cogwheels were visible a part of the time while he was off-bearing from the edger, and a part of the time were covered with rubbish and debris. It is probable (though the evidence is not very clear on that point) that he knew they were not entirely covered, but he says his attention was so confined to his work he did not have time to observe them closely.

1. It is not seriously controverted, as we understand it, that there was evidence sufficient, if believed by the jury, to show that the defendant was negligent in leaving the cogwheels uncovered near where its employees were required to work. The contention is that the danger therefrom was open, visible, known to and appreciated by the plaintiff, and therefore he was guilty of contributory negligence at the time of his injury in not looking for or remembering the location of the wheels, and allowing his foot to come in contact therewith. The service being performed by the plaintiff at the time of the accident was not in the regular course of his employment, or, indeed, that of any other workman in the mill. It was an unusual condition, due to the breaking down of the slasher, causing the slabs, etc., to accumulate in and over the cogwheels. The plaintiff and others were, by order of the master, taken from their usual work, and set to removing the

accumulation, so that the mill could be operated in the regular way. The plaintiff's previous knowledge of the location and operation of the cogwheels, if he had such knowledge, was, of course, an important fact for the jury, in determining whether he was acting at the time of his injury as a reasonably prudent man, but it was not necessarily decisive. The service to be performed was probably of a character that required his exclusive attention to be fixed upon it, and that he should act with promptness and rapidity. It cannot, therefore, be said, as a matter of law, that his knowledge of the location of the cogwheels, or his temporary forgetfulness of the danger therefrom, will prevent his recovery: *Wharton, Negligence* (2 ed.), § 219; *Lee v. Woolsey*, 109 Pa. 124; *Kane v. North Central Ry.* 128 U. S. 91 (9 Sup. Ct. 16, 32 L. Ed. 339); *Mann v. Oriental Print Works*, 11 R. I. 152; *Dallemand v. Saalfeldt*, 175 Ill. 310 (51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214); *Hale Elevator Co. v. Trude*, 41 Ill. App. 253; *Stephens v. Hannibal & St. Jo. Ry. Co.* 96 Mo. 207 (9 S. W. 589, 9 Am. St. Rep. 336); *Ryerson v. Abington*, 102 Mass. 526; *Greenleaf v. Dubuque & Sioux City R. Co.* 33 Iowa, 52.

2. A servant, by entering the employment of a master with knowledge of the conditions under which the work is conducted and of the appliances used, assumes all the open and visible risks incident to such employment; and his temporary forgetfulness thereof or inattention thereto, unless brought about by some cause which to the average man would be adequate to justify the mental state thus designated, would not avail him as an excuse. He is required to use his thinking faculties and exercise ordinary care and prudence under the circumstances: 1 *Labatt, Mast. & Serv.* § 281; *Beach, Contrib. Neg.* (3 ed.), § 37. Such are the cases of *Stone v. Oregon City Mfg. Co.* 4 Or. 52; and *Hurst v. Burnside*, 12 Or. 520 (8 Pac. 888). In both of these cases the question of the plaintiff's contributory negligence was submitted to and passed upon by the jury as a question of fact. In each of them the injured party was engaged in his usual employment in and about dangerous machinery. The court held that it was the duty of a servant, under such circumstances, "to exercise his thinking faculties, and give careful attention to the business in

which he was engaged" (*Stone v. Oregon City Mfg. Co.* 4 Or. 52), unless the facts "were such as to excuse him from that degree of care and thoughtfulness a prudent man would ordinarily exercise": *Hurst v. Burnside*, 12 Or. 520, 531 (8 Pac. 893). Where, as in this case, a servant is called upon to execute an order requiring prompt attention and haste, he is not conclusively presumed to remember a defect in the machinery, or a particular danger connected with his work. "A prompt and faithful employee," says the Supreme Court of Pennsylvania in *Lee v. Woolsey*, 109 Pa. 124, "suddenly called upon by a superior to do a particular act, cannot be supposed to remember at the moment a particular danger incident to its performance, of which he had previous knowledge; and it would be most unreasonable to demand of him the thought and care which might be exacted where there is more time for observation and deliberation." Whether in such a case the injured party was guilty of contributory negligence is a question of fact, and not one of law. Indeed, in an action against a master to recover damages for an injury to a servant due to the negligence of the former the question of contributory negligence on the part of the injured party is ordinarily a question of fact in all cases: *Nosler v. Coos Bay R. Co.* 39 Or. 331 (64 Pac. 644, 22 Am. & Eng. R. R. Cas. 720); *Beach, Contrib. Neg.* (3 ed.), § 448. It is not declared as a matter of law in any case, unless the danger was not only avoidable if the servant had acted prudently, but also such as no prudent man would have incurred. Mere knowledge of the danger is not conclusive of negligence in failing to avoid it. A servant's knowledge and his voluntary exposure to the danger are probative facts from which the ultimate fact of negligence must be determined, but they are not conclusive. That the servant exposed himself to dangers which could have been avoided imports negligence only when they were of such a character that a man of ordinary prudence and caution would have refused to have incurred them in the performance of his duties, and these are ordinarily questions of fact, and not of law: *Beach, Contrib. Neg.* (3 ed.), § 450; 1 *Labatt, Mast. & Serv.* § 322.

It follows that the judgment of the court below must be reversed, and a new trial ordered.

REVERSED.

Argued 25 January, decided 27 March, 1905.

NYE v. BILL NYE MILLING CO.

80 Pac. 94.

AMENDING PLEADINGS AFTER REVERSAL—DISCRETION.

1. Under B. & C. Comp. § 102, providing that the court, at any time before trial, and on such terms as may be proper, may allow any pleading to be amended, it is not an abuse of discretion, after reversal of a judgment, to permit plaintiff to amend his complaint, without imposing as a condition the payment of costs and disbursements incurred by defendant on the former trial and appeal, which were made a valid charge against plaintiff by Section 563.

REQUEST TO PLEAD AS A WAIVER OF A PRIOR PLEADING.

2. A request for time to plead is an abandonment of a pleading already filed, and the case then stands as though the prior plea had not been filed.

VACATING JUDGMENT—DISCRETION.

3. A motion to set aside a judgment being addressed to the sound discretion of the trial court, as provided by B. & C. Comp. § 103, the court's action thereon will not be disturbed except for apparent abuse of its power.

INADVERTENCE AND EXCUSABLE NEGLECT—SURPRISE.

4. On December 19 the court allowed defendant an extension of time to January 2 to file an answer. No effort was made to do so until January 4, when application was made for a further extension on the ground that it desired to plead a counterclaim, and that the facts were known only to defendant's general manager, whose absence, in consequence of his mother's death, precluded the preparation of such defense, but no attempt was made to excuse the default. Defendant's motion was denied, and judgment entered for plaintiff, whereupon defendant moved to set the same aside, and tendered an answer not alleging a counterclaim, but relying on parts of defendant's by-laws, which were at all times available. *Held*, that defendant was not entitled to vacation of such judgment on the ground that it was entered by inadvertence, excusable neglect, surprise, mistake or an abuse of discretion.

From Jackson: **HIERO K. HANNA**, Judge.

Statement by **MR. JUSTICE MOORE**.

This is an action by N. B. Nye against the Bill Nye Gold Mining & Milling Co. to recover the sum of \$800 for services alleged to have been performed by plaintiff for the defendant, a private corporation. A former judgment having been reversed (42 Or. 560, 71 Pac. 1043), the cause was remanded, and an amended complaint filed September 15, 1903, in pursuance of previous leave of court. On that day the defendant's counsel moved to set aside the order permitting the amended complaint to be filed, and, as a condition precedent to the exercise of such discretion on the part of the court, insisted that plaintiff should be required first to pay the costs and disbursements theretofore incurred by the defendant in the circuit and supreme courts. This motion was denied December 19, 1903, and defendant allowed two days in which to file an answer, but on application therefor by defendant's counsel, supported by his affidavit that

it was necessary to plead a counterclaim as defense, a further extension was granted for that purpose to January 2, 1904. No answer was filed, however, within the time prescribed, but two days thereafter the court was asked to grant another extension of 30 days to plead, the application being supplemented by the affidavit of defendant's counsel to the effect that the general manager of the corporation had been called East by the illness of his mother, who had since died, and that no other person, within his knowledge, could furnish the facts necessary to be stated in the answer to constitute the defense relied upon. The motion was denied on the day it was interposed, and judgment was thereupon entered against the defendant for the sum demanded.

The defendant's counsel, on February 4, 1904, moved the court to set aside the judgment, on the ground that at the time it was given their client was entitled to a trial of the action by reason of the fact that the original answer had never been withdrawn, that the judgment was rendered against defendant by reason of its mistake, inadvertence, surprise, and excusable neglect, and that a valid defense to the amended complaint existed on the merits, as was evidenced by an answer which was therewith tendered. The proposed answer did not allege any facts constituting a counterclaim, but set out what purported to be copies of parts of the by-laws of the corporation, and averred that, by reason thereof, plaintiff was estopped to assert that any sum was due him for alleged services which he may have performed for the defendant. The affidavit of W. E. Blackmer, the defendant's general manager, was submitted with the motion, showing that his mother's death prevented his return in time to prepare an answer; that, prior to his departure from the State, one D. R. Andrus, defendant's superintendent, was instructed to keep him advised in relation to the condition of this action; that on December 19, 1903, Andrus telegraphed him that the cause had been postponed, without notifying him that it was necessary that he should return in order that an answer might be filed; and that he did not know that the judgment had been rendered until January 27, 1904, when he was informed thereof at Rockford, Ill., whereupon he immediately returned to Oregon. The sworn

statements thus made are corroborated by the affidavit of Andrus, who deposes that about December 19, 1903, he understood from defendant's counsel that this cause had been continued for the term, and so telegraphed Blackmer; that he did not know that it was necessary for the general manager to return in order that an answer might be prepared; that he was not aware of the rendition of the judgment until about January 8, 1904; and that his failure to notify Blackmer was due to his misapprehension as to the postponement of the cause. The affidavit of defendant's counsel shows that, when the case was postponed, the affiant informed Andrus of the time within which the answer was required to be filed, and told him that it was necessary that Blackmer should return for that purpose; and that the failure to notify the defendant's manager resulted from the superintendent's mistake as to the extent of the continuance granted. The affidavits of the plaintiff and of his counsel are to the effect that Blackmer's return was not necessary to the preparation of the answer, which did not allege facts constituting a counterclaim, but set out certain part's of the defendant's by-laws, which were at all times in the county in which the action was tried, in the custody of the defendant, and accessible to its counsel. The motion to vacate the judgment was denied, and the defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. George Frederick Martin*.*

For respondent there was a brief and an oral argument by *Mr. William Ira Vawter*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is contended by defendant's counsel that, the judgment given at the first trial having been reversed by reason of the insufficiency of the complaint (42 Or. 560, 71 Pac. 1043), the court erred in permitting that pleading to be amended, without requiring plaintiff to pay the costs and disbursements incurred by the defendant at such trial in the circuit and supreme courts. The costs and disbursements of the former trial, for the pay-

*NOTE.—This attorney did not represent the appellant in the trial court.
REPORTER.

ment of which the defendant was liable, became, on a reversal of the judgment, a valid charge against plaintiff, which he should reimburse: B. & C. Comp. § 563. These charges being an obligation which the law imposes on the defeated party to an action, was the refusal of the trial court to prescribe the payment thereof, as a condition precedent to the filing of an amended complaint, such an abuse of discretion as to cause a reversal of the judgment? The court may at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading to be amended by adding an allegation material to the cause: B. & C. Comp. § 102. Though the legal propositions which have arisen and been decided on a former appeal became the law of the case, so far as applicable to the facts developed on a subsequent trial (*Powell v. Dayton, S. & G. R. R. Co.* 14 Or. 22, 12 Pac. 83), a judgment reversed is regarded as if it had never existed, and the parties are restored to their rights as they were before it was rendered: *Williams v. Simmons*, 22 Ala. 425. Therefore, in the case at bar, when the judgment given at the former trial was reversed, and the mandate of this court entered in the journal of the court below, the cause stood as though no trial had ever been had, thereby authorizing the circuit court to allow the complaint to be amended, in furtherance of justice, and upon such terms as to it might have seemed proper: *Lieuallen v. Mosgrove*, 37 Or. 446 (61 Pac. 1022). The granting or the refusal of leave to amend a pleading is a matter resting in the sound discretion of the trial court, which will not be disturbed except for an abuse thereof: *Green v. Iredell*, 31 S. C. 588 (10 S. E. 545). In *Gallagher v. Dunlap*, 2 Nev. 326, a judgment, having been rendered against the defendant on the pleadings, was reversed, with leave, granted by the supreme court, to amend the answer. In a petition for a rehearing it was insisted that the defendant should be required to pay the costs of the appeal as a condition precedent to his being permitted to amend the answer. Mr. Justice BEATTY, replying to the question thus presented, says: "We see no reason for such a course. There is nothing in the case to show us that defendant is making a sham defense. For aught we know, his defense may be a perfectly good one. We are not disposed to deprive him of the

opportunity of making his defense because, perchance, he may not have the ready money to pay the costs of the appeal." The transcript in the case at bar fails to disclose any fact from which an abuse of discretion can be inferred, and no error was committed in denying the motion to impose terms as a condition precedent to the right to file an amended complaint.

2. It is insisted by defendant's counsel that after the former judgment was reversed, as no new answer was filed, the original answer, so far as it put in issue the allegations of the amended complaint, constituted a defense thereto, which entitled defendant to a trial on the merits, and, this being so, the court erred in rendering judgment against it as for want of an answer. It will be remembered that the court, on December 19, 1903, having denied the motion to require plaintiff to pay the costs and disbursements of the former trial, allowed defendant two days in which to plead to the amended complaint, whereupon its counsel asked for and was granted leave until January 2, 1904, to file an answer. This application to replead constituted an election to abandon the answer (*Slemmons v. Thompson*, 23 Or. 215, 31 Pac. 514), though it may then have been on file: 6 Enc. Pl. & Pr. 88; *Seawell v. Crawford* (C. C.), 55 Fed. 729; *Robinson v. Keys*, 9 Humph. 144.

3. It is maintained by defendant's counsel that the judgment complained of was rendered against the defendant through its mistake, inadvertence, surprise, and excusable neglect, and hence the court erred in refusing to set aside its decision, and to permit the answer tendered to be filed. The court, on December 19, 1903, extended the time to January 2, 1904, in which to file an answer to the amended complaint. No effort appears to have been made to comply with the terms of this order until January 4, 1904, when defendant's counsel applied for a further extension of time to file an answer, without attempting, in any manner, to excuse their default. There being no answer to the amended complaint, judgment, for want thereof, was rendered against the defendant on the day the last application for an extension was made. The motions for extensions in which to file an answer, made December 19, 1903, and January 4, 1904, state that, for a defense to the amended complaint, defendant's coun-

sel desire to plead a counterclaim, but that the facts necessary to constitute such set-off were known only to the defendant's general manager, whose absence, in consequence of his mother's illness and death, precluded the preparation of the intended defense. A motion to set aside a judgment is addressed to the sound discretion of the trial court (B. & C. Comp. § 103), and its action, whether in vacating a judgment or in refusing to set it aside, will not be disturbed except in cases of apparent abuse of the power which it possesses in this particular: *Thompson v. Connell*, 31 Or. 231, 232 (48 Pac. 467, 65 Am. St. Rep. 818); *Hanthorn v. Oliver*, 32 Or. 57, 62 (51 Pac. 440, 67 Am. St. Rep. 518); *Coos Bay Nav. Co. v. Endicott*, 34 Or. 573 (57 Pac. 61).

4. No undue advantage should ever be taken of a party who, or whose chief witness, has necessarily been called away from the place of trial by reason of the serious illness or death of a member of his family, and if, in consequence of his absence to minister to the relief of a dangerously ill intimate relative, or to pay the last sad tribute of respect to one who in life was dear to him, a judgment has been rendered against such party, it ought to be set aside, if application therefor be made within the time prescribed, unless his presence or that of his principal witness at the trial, or in making preparation therefor, was unnecessary. An examination of the answer tendered, and a consideration of the affidavits offered in support of and opposed to the motion to vacate the judgment, induce the conclusion that the presence of the defendant's general manager was not necessary to a preparation of the answer sought to be interposed, and that no abuse of discretion is disclosed by the court's refusal to set aside the judgment. The defendant had at its command sufficient means of securing the desired information, and ample opportunity to prepare and file its answer at any time prior to January 2, 1902, but, instead of doing so, its counsel did not even ask for an extension of time until two days thereafter, when a default had already occurred.

It follows that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Argued 1 February, decided 3 April, 1905.

KASTON v. PAXTON.

80 Pac. 209.

OWNERSHIP OF RENT ACCRUING BETWEEN EXECUTION SALE AND DATE OF REDEMPTION—CHOSE IN ACTION.

1. Rent for premises sold on execution becoming due after the date of the sale but before a redemption is an assignable chose in action belonging to the execution debtor, and does not pass with a conveyance of the land unless specially mentioned.

EQUITY JURISDICTION—REMEDY AT LAW—ACCOUNTING.

2. Equity has no jurisdiction over a proceeding to recover a definite sum of money claimed by plaintiff, unless the accounts are too long and complicated to be appropriately submitted to a jury, the remedy at law being ordinarily sufficient.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by J. E. Kaston against Bessie W. Paxton, resulting in a decree as prayed for. The facts are stated in the opinion.

REVERSED.

For appellant there was an oral argument by *Mr. Ossian Franklin Paxton*, with a brief to this effect.

I. Under the only two statutes in the United States like Section 253, B. & C. Comp., the courts held that in such a case as this the rent received by a purchaser at a foreclosure sale during the time the property is so held belongs to such purchaser: *Hardy v. Herriott*, 11 Wash. 460 (39 Pac. 958); *Knipe v. Austin*, 13 Wash. 189 (43 Pac. 25, 44 Pac. 531); *Harris v. Reynolds*, 13 Cal. 515 (73 Am. Dec. 600); *Kline v. Chase*, 17 Cal. 506; *Knight v. Truett*, 18 Cal. 113; *Walls v. Walker*, 37 Cal. 424 (99 Am. Dec. 290); *Kannon v. Pillow*, 26 Tenn. (7 Humph.) 281.

II. The redemption made by Kaston from the foreclosure sale terminated the effect of the sale, and left the property as though no sale had been made, which is the same as if Lundin himself had kept the title and redeemed: *Willis v. Miller*, 23 Or. 352 (31 Pac. 827); *Flanders v. Aumack*, 32 Or. 19 (67 Am. St. Rep. 504, 51 Pac. 447); *Williams v. Wilson*, 42 Or. 299 (95 Am. St. Rep. 745, 70 Pac. 1031). Lundin, being the owner of the property, evidently owned the rent, and it does not belong to Kaston.

III. The rent accrued and collected during the time the property was in possession of the purchaser under the sheriff's sale did not pass under the deed of the land, there being no special mention or grant of it: 3 Kent, Com. 464; 12 Am. & Eng. Enc.

Law (1 ed.), 732; *Thornton v. Strauss*, 79 Ala. 164, 166; *Page v. Lashley*, 15 Ind. 152, 154; *Van Driel v. Rosierz*, 26 Iowa, 575, 578; *Damren v. American L. & P. Co.* 91 Me. 334 (40 Atl. 63); *Burden v. Thayer*, 3 Metc. (Mass.) 76, 80 (37 Am. Dec. 117); *Massachusetts H. L. I. Co. v. Wilson*, 10 Metc. (Mass.) 126; *Culverhouse v. Worts*, 32 Mo. App. 419, 428; *Cheney v. Woodruff*, 45 N. Y. 98, 101; *Jolly v. Bryan*, 86 N. C. 457, 462; *Gibbs v. Ross*, 39 Tenn. (2 Head.) 437; *Rowan v. Riley*, 65 Tenn. (6 Baxt.) 67; *Hayden v. McMillan*, 4 Tex. Civ. App. 479, 483.

For respondent there was an oral argument by *Mr. Granville Gay Ames*, with a brief to this effect.

The rents accruing between the day of the sale and the delivery of the deed belong to the owner of the equity of redemption, and not to the purchaser: 11 Am & Eng. Enc. Law (2 ed.), 233, 234; 2 Jones, Mortgages (4 ed.), §§ 1114, 1118, and 1659; *Ten Eyck v. Casad*, 15 Iowa, 524; *Bunce v. West*, 62 Iowa, 661; *Ruckman v. Astor*, 9 Paige, 517; *Gelston v. Thompson*, 29 Md. 595; *Balfour v. Rogers*, 64 Fed. 925; *Cartwright v. Savage*, 5 Or. 397; *Strang v. Allen*, 44 Ill. 428.

PER CURIAM. This is a suit for an accounting. The complaint states, in effect, that one P. O. Lundin was on June 29, 1894, and September 21, 1895, the owner of certain real property in Portland, which he mortgaged to the Alliance Trust Co., Limited, to secure the sums of \$3,000 and \$1,000, respectively, the debts maturing July 1, 1899 and 1900; that these mortgages were assigned to one Jennie Y. Wade, who, upon default in the payment of the sums due, secured a decree foreclosing the liens thereof, and executions having been issued thereon, the premises were sold thereunder to the defendant, who, on a confirmation of the sale, September 18, 1902, took possession of the land and collected the rents thereafter accruing, amounting to \$528.20; that on August 19, 1903, Lundin and his wife sold and conveyed the premises to plaintiff, who, three days thereafter, redeemed the same from the sale thereof under the decree of foreclosure; and that the defendant, having been requested by plaintiff to pay to him the rents she had collected, refused to comply therewith. A demurrer to the complaint on the ground that it did not state

facts sufficient to constitute a cause of suit having been overruled, and the defendant declining further to plead, a decree was rendered against her for the sum demanded, and she appeals.

1. It is contended by defendant's counsel that the rents received in the case at bar accrued prior to the conveyance of the premises to plaintiff, and the right thereto did not pass by the deed executed to him, and that a suit in equity cannot be maintained for the recovery of the sums secured, for which reasons an error was committed in overruling the demurrer. Rent, in the legal sense, is a compensation paid for the use of demised premises, and is treated as a profit arising out of lands and tenements corporeal: Wood, Land. & Ten. § 448. The rents involved herein accrued before the land was conveyed to plaintiff, and, though the right to recover the sum received on account thereof might have been assigned by Lundin, as a chose in action (*West Shore Mills Co. v. Edwards*, 24 Or. 475, 33 Pac. 987), such right did not pass to plaintiff under the habendum clause of his deed: *Jolly v. Bryan*, 86 N. C. 457. There is no averment in the complaint that the right to the rent which accrued prior to the execution of the deed to plaintiff was assigned to him, and, as the compensation for the use of the premises was payable to Lundin, the owner of the reversion when the rent became due, the plaintiff does not show a prima facie right to recover the sum collected by the defendant: 18 Am. & Eng. Enc. Law (2 ed.), 280; *Page v. Lashley*, 15 Ind. 152; *Van Driel v. Rosierz*, 26 Iowa, 575; *Damren v. American L. & P. Co.* 91 Me. 334 (40 Atl. 63); *Burden v. Thayer*, 3 Metc. 76 (37 Am. Dec. 117); *Hayden v. McMillan*, 4 Tex. Civ. App. 479 (23 S. W. 430). The complaint therefore did not state facts sufficient to entitle plaintiff to recover the rents which accrued prior to the execution of his deed.

2. If the complaint were sufficient in this respect, however, the remedy would be an action to recover the rents as money had and received to plaintiff's use, unless, possibly, by reason of the account being long and complicated, a resort to the other forum might be upheld (*Harris v. Reynolds*, 13 Cal. 514, 73 Am. Dec. 600), which is not alleged herein. As the complaint does not state any facts justifying a recourse to a court of equity, and

fails to aver an assignment of the rents, the decree must be reversed, the demurrer sustained, and the suit dismissed; and it is so ordered.

REVERSED.

Argued 9 February, decided 10 April, 1905.

LEWIS v. BEEMAN.

80 Pac. 417.

MINERS' LIENS—PROPER AND NECESSARY PARTIES.

1. Under B. & C. Comp. § 5668, making lessors of mining property, though worked by lessees, liable for the claims of miners, unless a copy of the lease is recorded in the mine records in the proper county, and Section 5672, requiring persons personally liable for the payment of the claims of miners to be made parties to a suit to foreclose a lien on the mine, the lessees are proper though not necessary parties. The statute is for the benefit of the owner, and he may expressly or impliedly waive his right to have the lessee brought in, as, by not so demanding at the proper time.

MINERS' LIENS—DESCRIPTION OF PROPERTY.

2. In a suit to foreclose miners' liens, no issue being raised as to the identity of the property in question, it is not necessary to introduce in evidence the record of mining claims referred to in the lease of the property given by defendants and in the notice of lien, nor certified copies of the mining journals of the county relating to the property, but a sufficiently certain decree can be rendered by referring to the volume and page of the records in question, as specified in the lease and notice of lien.

MINERS' LIENS—BURDEN OF PROOF AS TO PAYMENTS.

3. In a suit to subject leased property to the satisfaction of miners' liens arising out of debts contracted by the lessee, the burden is on the lien claimants to show, as against the owners, that no payments have been made on account of their liens since they were filed.

PRIORITY OF LEASE OVER LIENS.

4. Under the express provisions of B. & C. Comp. § 5668, no lien can be enforced against mining property for labor performed for the lessee where the lease was recorded before the work was begun.

MINERS' LIEN—STATEMENT OF AMOUNT DUE.

5. Under Section 5669, B. & C. Comp., relating to liens against mining claims, which requires a claimant to file a "true statement of his demand, after deducting all just credits," a statement not giving a credit for a conceded payment is fatally defective, even though the credit be unimportant in amount.

From Jackson: HIERO K. HANNA, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by Alfred Lewis and others to foreclose miners' liens. The defendants Joseph H. Beeman and Hattie H. Beeman on November 1, 1902, leased to the defendants F. B. Flanders and N. H. Beers certain quartz mining claims and other real property in Jackson County, together with a stamp mill erected thereon; and, the possession of the premises having been delivered to the lessees, the several plaintiffs were employed in operating and developing the mines. Flanders left the property

December 8, 1902, in charge of the plaintiff Alfred Lewis, who two days thereafter dismissed the laborers; and within the time prescribed by law they severally filed liens against the mining claims and mill to secure the sums due each, respectively, as follows: Alfred Lewis, \$85.75; M. L. Hall, \$29.50; S. C. Lawrence, \$42.25; Frank Cardwell, \$63; Thos. E. Jones, \$30; and John F. Troy, \$34. These laborers, as plaintiffs, commenced a joint suit to foreclose their several liens, in which the premises were described as in the lease and in the several notices of liens; the description of the first mine mentioned in the complaint, illustrating the manner of identifying the property, is as follows: "That certain quartz mining claim known as the 'Columbia,' amended location notice of which is recorded in volume 11, at page 610, of the mining records for Jackson County, Oregon"—alleging that the several mining claims produced gold, and were operated as one mine; that the ore extracted therefrom was reduced at the mill in question; that the defendants Joseph and Hattie H. Beeman were the reputed owners of the property; that the defendant Flanders was in charge thereof, and the defendant Beers was reputed to be connected in some manner therewith; that each of the several plaintiffs had been compelled to pay the sum of \$1.25 for recording his notice of lien; and that the sum of \$20 each was a reasonable attorney's fee for the foreclosure of the several liens. The summons was served only on the defendants Joseph and Hattie Beeman, who, alone appearing, answered, denying upon information and belief the material allegations of the complaint, and, for a further defense, averring that Hattie H. Beeman was the owner of the mill, and Joseph H. Beeman of all the mines, described in the complaint; that the defendants Flanders and Beers were operating the mines under the written lease hereinbefore mentioned, which was executed prior to the time when either of the plaintiffs began their labor on the property, of which they had notice, and agreed not to claim any lien on the mining claims for any labor so performed, but that they would look to Flanders and Beers for the payment of any sums that might be due them. The reply having put in issue the allegations of new matter in the answer, the cause was referred to F. M. Calkins, who took and reported

the testimony, which, when submitted, the court dismissed the suit because the defendants Flanders and Beers did not appear, that they were not served with process, nor was any showing made that they were not in Jackson County, and the plaintiffs appeal.

REVERSED.

For appellants there was a brief over the names of *J. L. Hammersly* and *Enoch B. Dufur*, with an oral argument by *Mr. Dufur*.

For respondents there was a brief over the names of *A. Evan Reames* and *C. L. Reames*, with an oral argument by *Mr. Clarence L. Reames*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is contended by plaintiffs' counsel that, without any objection on the part of either of the Beemans, the cause was referred, and, the testimony having been taken in pursuance thereof, they are estopped to assert that Flanders and Beers should have been served with process, and hence an error was committed in dismissing the suit. The statute commands that all persons personally liable for the payment of the sum due for labor performed in operating or developing a mine, to secure which sum a lien is foreclosed, shall be made parties: B. & C. Comp. § 5672. In *Osborn v. Logus*, 28 Or. 302 (37 Pac. 456, 38 Pac. 190, 42 Pac. 997), in construing a similar provision in another section of the statute, it was ruled that, in a suit to foreclose a mechanic's lien, though the contractor ought to be brought in, if he could be served with process, he was not an absolutely indispensable party, and that, unless an objection for lack of parties was made by demurrer or answer, the defect was waived. In deciding that case, Mr. Justice WOLVERTON, in referring to another class of parties, says: "Subsequent lienors are considered necessary parties, but their absence from the record does not perforce of that fact, render the proceeding a nullity; but interested parties may require that they be brought in for their protection, and proper parties may be brought in if deemed necessary." Flanders and Beers, having leased the mining claims, and employed plaintiffs to assist in working and developing them, were personally liable for the payment of the wages agreed to

be paid therefor. If the lease executed by Joseph H. and Hattie H. Beeman was not recorded in the mining records of Jackson County before the work began, their property was also liable to plaintiffs for the payment of such compensation: B. & C. Comp. § 5668. The purpose of the statute, in requiring persons personally liable for the payment of the labor performed in operating and developing a mine to be made parties to a suit to foreclose a miner's lien, was evidently not designed to exempt the property from liability for the work done, but to enable the owner of the mine, if compelled to pay the sums decreed to be a lien upon it, to have a judgment over against the lessee, which he could enforce without instituting another suit therefor. The statutory requirement of making persons parties who are personally liable, which was enacted for the benefit of the mine owner, is not one in the enforcement of which the public has an interest, and therefore such owner can waive the advantage which the law confers. This he does when he fails to demand that the persons personally liable shall be brought in for his protection (*Osborn v. Logus*, 28 Or. 302), and, in the case at bar, as the Beemans did not object to the defect of parties until after the testimony was taken, they thereby voluntarily relinquished the right upon the exercise of which they insisted when the cause was submitted, in dismissing which the court erred.

2. The record of the mining claims referred to in the lease and in the notices of liens was not offered in evidence, and it is insisted by defendants' counsel that it is impossible, from the transcript, to frame a decree so as to identify the property. It will be remembered that the answer admitted that the defendants Joseph H. and Hattie H. Beeman were the owners of the property described in the complaint. No issue in relation to the identity of the property was created, and, this being so, no necessity existed for offering in evidence the volume and pages specified in the lease and notices of liens, or certified copies of the mining journals of Jackson County relating to the property in question. Invoking the maxim, *Id certum est quod certum reddi potest*, a decree referring to the volume and pages thus indicated will be sufficient for a description of the property, and an examination of such journal will probably enable the officer

making the sale to place the purchaser in possession thereof: *House v. Jackson*, 24 Or. 89 (32 Pac. 1027).

Considering the case on its merits, the testimony shows that the plaintiff Alfred Lewis is entitled to the sum of \$85.75, as claimed in his lien, with interest thereon from the time it was filed, together with the sum of \$1.25 for recording the notice, and the further sum of \$20 as a reasonable attorney's fee; and a decree will be here entered awarding to him such sums, and foreclosing his lien therefor, he having testified at the trial that the sums so demanded were due him.

3. The plaintiffs M. L. Hall, Frank Cardwell, and John F. Troy did not appear as witnesses at the trial; the testimony showing that neither of them was then in Jackson County. The plaintiff Alfred Lewis, who was foreman of the mines, testified in their behalf as to the correctness of the liens filed by each, in respect to the several sums due; but he did not say, and probably could not testify, that no payments had been made to them, or either of them, by Flanders or Beers, after the liens were filed. As the lessors' property is to be subjected in this suit to the payment of debts contracted by the lessees, the burden was imposed on the lien claimants of showing that no payments had been made on account of their liens since they were filed; and, not having done so, the claims of Hall, Cardwell and Troy must be disallowed.

4. The testimony shows that the plaintiff Thomas E. Jones commenced to work for Flanders and Beers two days after the lease of the mining claims was recorded in the mining journals of Jackson County. No lien is given for labor performed for a lessee on the mining claims of a lessor when the lease is so recorded before the work begins (B. & C. Comp. § 5668); but it is insisted by plaintiff's counsel that, though the instrument in question partakes of the nature of a demise, it was intended by the parties to evidence a contract of sale, and that upon the payment of \$16,500 the title to the property was to be transferred to the lessees. The defendant Joseph H. Beeman, in answer to the question on cross-examination, "Wasn't it understood between you and Mr. Flanders and Mr. Beers, if they paid the \$16,500, they were to have the property." replied, "Yes,

sir." Notwithstanding the testimony of this witness, we think the instrument, a copy of which was offered in evidence, clearly established the fact that it is what it purports to be—a lease of the mining claims and quartz mill; and, having been duly recorded before Jones began to work at the mine, he was not entitled to a lien on the property (*Stinson v. Hardy*, 27 Or. 584, 41 Pac. 116), and his claim is disallowed.

5. The plaintiff S. C. Lawrence, having been discharged by the foreman December 10, 1902, without having received any payment for his labor, and being without money, sold some groceries belonging to Flanders that were at the mine, realizing therefor about \$5, for which sum he gave no credit when he filed his lien. At the trial, Lawrence, as a witness in his own behalf, testified that after the work was suspended at the mines he looked after the property about two weeks, and that he considered his care thereof of greater value than the sum realized from the sale of the groceries. If the supervision of the property constituted a proper charge against the mining claims, so as to create a lien thereon, a statement thereof should have been included in the notice of lien, and credit given for the sum received from the sale of the groceries; assuming that Lawrence was authorized to dispose of the provisions. Not having done so, his lien notice did not contain a true statement of his demand, after deducting all just credits and offsets, and hence his claim is disallowed: *Nicolai v. Van Fridagh*, 23 Or. 149 (31 Pac. 288).

The decree of the court below will therefore be reversed, and one entered here in accordance with this opinion. REVERSED.

Argued 2 February, decided 3 April, 1905.

STINCHCOMBE v. NEW YORK LIFE INS. CO.

80 Pac. 213.

INSURANCE—CONSTRUCTION OF POLICY THAT DOES NOT BECOME EFFECTIVE UNTIL PAYMENT OF PREMIUM.

1. An application for insurance, made May 5th, stipulated that any policy that might be issued should not be in force until the actual payment and acceptance of the premium, during the applicant's lifetime and good health. The policy was issued, and a two years' term premium paid on July 24th. The policy provided that it was issued in consideration of the application, which was made a part of the contract, and in further consideration of the two years' term premium, and of the payment of the life premium on the 5th day of May every year thereafter during the continuance of the policy. *Held*, that the insurance became effective for the entire term of the policy, subject to the provisions prescribing forfeiture

for nonpayment of premiums, on July 24th, and the term premium covered and paid for insurance for two years from that date.

FORFEITURE—INCONSISTENT PROVISIONS OF POLICY.

2. Where a life insurance policy was issued on May 5th, but did not go into effect until July 24th, when the premium for two years was paid, the failure to pay a premium on May 5th, two years later, did not forfeit the policy, under a provision of forfeiture for nonpayment of any premium, the premiums being due on May 5th of each year, for the payment of the double premium extended the life of the contract for two years from July 24th.

TIME FOR FURNISHING PROOFS OF DEATH.

3. Noncompliance with a provision of an insurance policy requiring the beneficiary to furnish proofs within one year after the death of insured, to which no penalty is subjoined for nonobservance, does not forfeit the policy, but merely requires the furnishing of proofs prior to the bringing of an action.

LIMITATION—ACCRUAL OF RIGHT OF ACTION.

4. Under a policy requiring the beneficiary to furnish proofs of death and limiting the time for bringing an action on the policy, the cause of action does not accrue until the proofs of death have been received and approved by the insurer.

EFFECT OF RETAINING PROOFS OF DEATH WITHOUT OBJECTION.

5. The action of an insurance company in retaining without objection the proofs of death furnished by the beneficiary of a policy amounts to an approval of them.

From Multnomah: JOHN B. CLELAND, Judge.

This is an action by Idonia Stinchcombe against the New York Life Ins. Co. on an insurance policy. George W. Stinchcombe made application, May 5, 1894, at Forest Grove, Or., to defendant for insurance on his life in the sum of \$2,000, payable to his wife, the plaintiff, in case of his death during the continuance of the policy contemplated to be issued in pursuance thereof. Among other things, it was stipulated by the applicant that any policy that might be issued should not be in force until the actual payment to and acceptance of the premium by the company or its authorized agent during his (the applicant's) lifetime and good health, and that no suit should be brought against the company under "said contract" after the lapse of two years from the time the cause of action accrues. The defendant signed and issued its policy on July 10th following, which was transmitted to Stinchcombe, who accepted it and paid the premium of \$70.40, being for two years, on the 24th of the same month. The defendant by its policy promises and agrees to pay \$2,000 to Idonia Stinchcombe, wife of the insured, immediately upon receipt and approval of proofs of the death of the insured during the continuance in force of such policy. The policy further provides, and it is so conditioned, that it is made

in consideration of the written application therefor, and of the agreements and warranties therein contained, which are made a part of the contract, and in further consideration of \$70.40, to be paid in advance by the insured (being premium for two years' term insurance), and of the payment of \$47.40 (being the life premium), on the 5th day of May every year thereafter during the continuance of the policy. The benefits and provisions placed on the next page of the policy were also made a part of the contract. Among such provisions are found these:

"All premiums are due and payable at the home office of the company unless otherwise agreed in writing. * * If any premium is not thus paid on or before the day when due then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company.

"A grace of one month will be allowed in payment of premiums on this policy, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid.

"During said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance.

"Within one year after the death of the insured the company must be furnished at its office, in the city of New York, with proofs of death, which shall comprise satisfactory statements establishing the claim. Such statements must comply fully with the company's present forms. If it is found that the age of the insured was understated in the application, the amount of insurance payable shall be such proportion of the amount of the policy as the premium paid bears to the required premium at the true age."

The complaint contains two counts. The first, after setting out the issuance of the policy, its conditions, and the death of Stinchcombe on July 3, 1896, shows that the defendant, at the request of plaintiff, made March 22, 1900, sent her blank forms for proof of death, which were received on April 3d following; that on the 26th of the latter month she duly prepared said blanks by filling in the required data, and verified and forwarded the same to the company at New York City, and that the company received such proofs, and has since retained them

in its possession, without making any objections thereto. The action was commenced July 6, 1900. The second cause is, in effect, the same as the first, except that it states matter intended to show a waiver on the part of the company of the condition contained on the next page of the policy, providing that proofs of death must be furnished the company at its office in New York City within one year after the death of the insured. A demurrer was interposed to both these causes of action, which was sustained as to the first and overruled as to the second, and, trial being then proceeded with before a jury, the defendant at the close of the plaintiff's evidence moved for a judgment of nonsuit against plaintiff, which being granted, the case was dismissed, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Dell Stuart* and *Paxton, Beach & Simon*, with an oral argument by *Mr. O. F. Paxton*.

For respondent there was a brief and an oral argument by *Mr. Geo. H. Durham*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

1. The first question presented in the logical course of inquiry is whether the policy had lapsed prior to the decease of Stinchcombe, July 3, 1896. By its terms the life premium of \$47.40 is made payable on the 5th day of May in every year "thereafter," the premium for two years in advance having been paid on July 24, 1894. Under a condition of the application, the policy was not to be in force until the actual payment to and acceptance of the premium by the company, and during the lifetime and good health of the applicant. There was no binding receipt issued by the company, or its agent, putting the insurance in force from the date of the application, to wit, May 5, 1894, subject to the condition of its acceptance by the company and the issuance of the policy, as is sometimes done. We have therefore only to look to the terms of the policy to ascertain when it became effective as an insurance upon the life of Stinchcombe, and to determine the conditions upon which it might be continued in force, as well as those the nonobservance of which would entail a forfeiture. There was a care, it will be seen, on the part of

the company, that the policy should not be in force—that is, that the company should not itself become liable—except on the concurrent existence of certain conditions, namely, the actual payment of the premium during the lifetime and good health of the applicant. He might have been living and in good health, but without the actual payment of the premium no liability would have been incurred on its part, and that because, as the condition reads, the policy “shall not be in force.” Now, if it was intended that the policy should become effective as against the company only when these conditions were fulfilled on the part of the applicant, what is there in the contractual relations to put it in force or to cause it to become operative as against the applicant in the mean time? There are no other stipulations indicating an intendment of that nature, and, as we have seen, there is no binding receipt putting it into effect at once, either conditionally or otherwise. The policy was issued on July 10, 1894, and, if left to the provisions on the face of it alone, would ordinarily have been effective from that date; but the application is made a part of it, and so are the conditions and provisions on the next page following the signatures of the officers of the company, and all must be construed together to get at the true intendment of the parties as they are, and constitute in reality but one contract. If, therefore, the policy was not to be in force to bind the company until the concurrence of the conditions designated, it is a most reasonable and fair deduction that it was also not intended that it should become effective as it concerned the assured at a date prior to their fulfillment. The defendant either insured Stinchcombe from the 5th day of May, or it did not insure him until the 24th day of July, when the policy was delivered and the premium paid and accepted by it. It is certain that it did not make itself liable until the latter date, and are we to suppose that, without engagement to that purpose, the company intended to collect the premium and the insured to pay for insurance he did not have? Rather would the deduction be to the contrary. And such is our interpretation of the contract, that it did not become effective and binding as an insurance upon the life of Stinchcombe until such latter date,

either to fix the liability of the company or to require the insured to pay for insurance in the mean while.

2. Now, the \$70.40 paid for two years' insurance. It is so expressly stated in the policy as follows: "Being the premium for two years' term insurance." This insurance began with the date of July 24, 1894, by the delivery of the policy and the payment and acceptance of the premium, and Stinchcombe's life became insured, not alone for the term of two years, but for the entire term fixed by the policy according to its provisions, but subject to forfeiture for the failure to perform those conditions subsequent as might entail such a result, among which are those relating to the prompt payment of the premiums: *New York Life Ins. Co. v. Statham*, 93 U. S. 24 (23 L. Ed. 789). By one of the conditions on the next page, so denominated, a grace of one month is allowed in the payment of the annual premiums, subject to an interest charge, so that on the face of the contract there was accorded the insured 25 months in which to make the second payment of premium, thus extending the time to June 5, 1896. Such premium not having been paid before that date, a forfeiture was incurred, but when did it become operative? At once upon the default in meeting the payment, or at the end of the time for which the insured had paid for his insurance?

It is argued that the forfeiture clause is direct and unmistakable, and indicates an intendment that the policy should become at once void by reason of the nonpayment of the premium on the day it was demandable. It does not say so, however, but that it "shall become void." The interpretation would deprive the assured of a period of the insurance that he had actually paid for, to wit, from June 5th to July 24th, so that the forfeiture, in that view, would not only incur the penalty of depriving the assured of his right to continue under the contract, but also of cutting short by a most appreciable term the insurance absolutely obtained by payment of the premium for two years in advance. There is here a palpable incongruity, and, if the company's contention be the correct one as to the proper interpretation of the contract, it is perfectly manifest that it will be fraught with injustice to the beneficiary. It is

very well understood, a condition arising from an innate sense of justice, that the law in its policy and spirit is averse to the declaration of forfeitures, and will not entail such consequences as between individuals but in pursuance of the plain and obvious intendment of contractual relations. It is also a canon of the construction of contracts, so well settled as to need no citation of authorities to support it, that inconsistent provisions rendering it doubtful or uncertain whether, or under what conditions, a forfeiture was really intended, will be so interpreted, whenever they can, within the bounds of reason and common fairness, as to elude the forfeiture and secure to the parties that to which they are in justice entitled. Beyond this there is another rule that, as between inconsistent, conflicting, and incongruous provisions, of doubtful and ambiguous significance, in a policy of insurance, it being manifest that the form and all the necessary conditions are the statements, essentially, of the officers, agents, and attorneys of the company, the construction most favorable to the assured will be adopted and applied: *Fenton v. Fidelity & Cas. Co.* 36 Or. 283 (56 Pac. 1096, 48 L. R. A. 770); *Stringham v. Mutual Life Ins. Co.* 44 Or. 447 (75 Pac. 822); *National Bank v. Insurance Co.* 95 U. S. 673 (24 L. Ed. 563); *McMaster v. New York Life Ins. Co.* 183 U. S. 25 (22 Sup. Ct. 10, 46 L. Ed. 64). Now, applying these plain and obvious canons of construction and interpretation, it is neither inconsistent with reason nor fair dealing to conclude that the true intendment of the contract, looking through the whole of it, including the application, the policy, and the provisions on the next page, is that there should be no forfeiture of the insurance paid for—that is, of any part of the “two years’ term insurance”—and that the policy was not rendered void, as affecting such term or period, until its time had fully run. This does not take into account the effect of the provision touching the month of grace for making the payment, because not involved here. Such, in effect, is the holding of the Supreme Court of the United States in *McMaster v. New York Life Ins. Co.* 183 U. S. 25 (22 Sup. Ct. 10, 46 L. Ed. 64). In reality, this is a much stronger case than that for the beneficiary. It does no injustice to the insurance company having received the stipulated consideration,

and it conserves to the insured or his beneficiary that for which he has actually paid his money in the way of premium.

3. This brings us to the inquiry as to what is the effect of a noncompliance by the beneficiary with the clause in the contract of insurance requiring that proofs of death, comprising satisfactory statements establishing the claim, should be forwarded to the company at its office in New York City within one year after the death of the insured. Does such noncompliance avoid the policy so that the beneficiary has no basis upon which to found an action? Or, coupled with the clause limiting the right of action to a period of two years after the cause shall have accrued, has her right to sue become barred so that she is now without a remedy? Referring to the clause first mentioned, it will be seen that no penalty is subjoined, by way of forfeiture or other provision, rendering the policy void by reason of the nonobservance of the requirement, as is the case with respect to the preceding stipulation relating to the nonpayment of the premium within the designated time. In itself it is a bare undertaking that the beneficiary shall make the proofs within the year, without more. It must, however, be read in connection with the other clauses of the contract, and, when even so read, it becomes very clear under the authorities that it does not entail a forfeiture in case of a failure to make the proofs within the year. Mr. Joyce, in his work on Insurance, vol. 4, § 3282, says: "If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose a forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some time prior to commencing the action upon the policy." And by a preceding section (3277) he affirms that similar clauses in life policies are to receive a like construction. The text is supported by the following authorities: *Kenton Ins. Co. v. Downs*, 90 Ky. 236 (13 S. W. 882); *American Cent. Ins. Co. v. Heaverin*, 18 Ky. Law Rep. 190 (35 S. W. 922); *Orient Ins. Co. v. Clark*, 22 Ky. Law Rep. 1066

(59 S. W. 863); *Tubbs v. Fire Ins. Co.* 84 Mich. 646 (48 N. W. 296); *Hall v. Concordia Ins. Co.* 90 Mich. 403 (51 N. W. 524); *Aurora F. & M. Ins. Co. v. Kranich*, 36 Mich. 289; *Coventry Mut. L. S. Ins. Assoc. v. Evans*, 102 Pa. 281; *Taber v. Royal Ins. Co.* 124 Ala. 681 (26 South. 252). The effect of such a provision when no forfeiture is entailed, and there has been a non-observance within the period designated, is to postpone the right to sue until the requirement as to proofs has been complied with: *Spare v. Home Mut. Ins. Co.* (C. C.) 17 Fed. 568; *Kahnweiler v. Phoenix Ins. Co.* (C. C.) 57 Fed. 562; *Mayor of New York v. Hamilton Fire Ins. Co.* 39 N. Y. 45 (100 Am. Dec. 400); *Vangindertaelen v. Phenix Ins. Co.* 82 Wis. 112 (51 N. W. 1122, 33 Am. St. Rep. 29). Of course, if any damage has resulted to the company by reason of the breach of the undertaking on the part of the beneficiary, it would be entitled to that, but it is not thereby relieved of liability on the policy. Compliance within the time is therefore not a condition precedent to a recovery, but a compliance at some time within the period within which an action may be maintained is a condition precedent to the right of action.

4. The idea is suggested, and not without some show of reason for its support, that it was the intendment of the two clauses, namely, the one fixing the time within which the proofs must be made, and the other determining the period limiting the right of action, when read together, to fix the uttermost limit at which an action could be maintained at three years—that is, one year in which to make the proofs and two years thereafter in which to commence the action—and that in no event was it designed that the action could be maintainable after the lapse of the combined periods. The policy is so drafted, however, that no cause of action accrues until the receipt and approval by the company of the proofs of death. It is not the incident of the death of the assured alone that gives rise to the cause, but it requires also the receipt and approval by the company of the proofs of death to be furnished by the beneficiary, as it is only upon such conditions that the company agrees to pay, and, of course, if insisted upon, unless there has been a waiver, no action could possibly be maintained until they have been com-

plied with. Thus conditioned, the company would have the policy so construed that it incurs no liability until it has received and approved the proofs of death, and in the mean time have the statute of limitations, which the parties have fixed, running against a cause of action that has never accrued. There is here, also, an inherent incongruity that ought not to avail to entrap the unwary, and the only rational construction, fair alike to both contracting parties, is that the cause of action does not accrue until the receipt and approval by the company of the proofs of death, and that the prescribed statute of limitations begins to run from that date. If, however, the company has suffered damage by reason of the delay in not making the proofs within the time specified, it ought to have its remedy to that extent. This is the legitimate result of what we are impressed is the equitable as well as reasonable interpretation of the contract the parties have entered into. It can do no injustice in any direction.

To indicate this we have but to trace briefly the incidents leading to the consummation of the contract. On May 5, 1894, Stinchcombe made his application upon one of the regular forms provided by the company. In it he was required to stipulate that any policy issued in pursuance thereof—one that, supposedly, he had never seen—"should not be in force until the actual payment to and acceptance of the premium by said company," and that "no suit shall be brought against said company under said contract after the lapse of two years from the time the cause of action accrues." On the 24th of July following, the policy arrived, whereby the company agreed to pay \$2,000 stipulated insurance immediately upon the receipt and approval by the company of the proofs of death during its continuance in force. This is followed by a clause reciting that the consideration for which the policy is issued is the sum of \$70.40, payable in advance, being the premium for two years' term insurance, and the payment of \$47.40, being the life premium, on the 5th day of May in every year thereafter during the continuance of the policy. Then follow the signatures of the officers of the company, after a short clause as to its incontestability, but on the next page are numerous provisions, all made a part of the

contract as well as the application. Among them are those pertaining to the payment of the premiums, the avoiding of the policy for nonpayment when due, a month of grace and the time within which the proofs shall be made, all of which we have fully discussed, and are sufficiently understood. This contract, made up of all these conditions, the assured does not receive until he has actually paid the first two years' premium, so that he has had no voice in its formulation, which is wholly the product of the company, drawn presumably to protect, as far as possible, its own interests. With these notations in view, it needs but a glance to appreciate the inconsistencies and ambiguities attending the several conditions, sufficient to tax to the uttermost the ingenuity of the best legal minds to ascertain and determine their true intent. Is anything more necessary to afford ample reason for the rule that the provisions of the policy must be construed most favorably to the assured, and, conversely, most strongly against the company? And, observing this rule and other canons of construction with regard to forfeitures, we are impelled to the conclusion heretofore reached in the discussion of this case.

5. As shown by the first cause of action set out in the complaint, the beneficiary forwarded to the company her proofs of the death of the assured on the 26th of April, 1900. These the company retained without objection, and must be deemed to have approved them. No action accrued to the plaintiff, therefore, until these things had been done, and, the action having been instituted on July 6th thereafter, it was within the time, under the stipulated limitation, for commencing the same. In this view the first count states a good cause of action, and there was error in sustaining the demurrer thereto, for which the judgment must be reversed and a new trial awarded.

This renders it unnecessary to determine the questions involved by the nonsuit, as they may not arise upon a retrial.

REVERSED.

Argued 21 February, decided 24 April, rehearing denied 22 May, 1905.

SANDYS v. WILLIAMS.

80 Pac. 642.

IMPLIED REPEAL OF STATUTE BY SUBSEQUENT ACT—CONFLICT BETWEEN LOCAL OPTION ACT AND CITY CHARTER.

1. The State local option law (Laws 1905, p. 41, c. 2), authorizing an election on petition to determine whether sale of intoxicating liquors shall be prohibited within any county or subdivision thereof (Sec. 1), providing that, on the result being for prohibition, the county court shall make an order prohibiting the sale (Sec. 10), making it an offense to thereafter sell such liquors within the inhibited territory (Sec. 15), does not supersede a city charter giving the council power to grant licenses and to provide for the revocation thereof, and to regulate and restrain liquor dealers and their places of business, the general act being only a modification of the earlier special municipal act, in that its application is dependent upon a vote for prohibition at an election. Until such an expression of the popular will the charter powers are unchanged.

CONSTITUTIONALITY OF LOCAL OPTION LEGISLATION.

2. *Quære*. Does a local option law that is in force or not, as the vote may go in certain districts, violate Const. Or. Art. I, § 21, prohibiting the enactment of any law the taking effect of which shall be made to depend upon any authority, except as provided therein?

EQUITY—ENJOINING MUNICIPALITIES.

3. Equity will restrain the action of municipal corporations attempting to proceed beyond their delegated powers.

INTOXICATING LIQUORS—EXERCISE OF POLICE POWER.

4. An ordinance forbidding the sale of intoxicating liquors in any room or box connecting with a saloon is not an unreasonable or oppressive restriction, but is an appropriate exercise of the general police power conferred by the city charter.

VALIDITY OF EXCEPTIONS IN ORDINANCE REGULATING SALES OF INTOXICATING LIQUORS—SPECIAL PRIVILEGES.

5. An ordinance interdicting the sale of intoxicating liquors in a private room does not, by making an exception in favor of hotels, contravene Const. Or. Art. 1, § 21, inhibiting laws granting privileges which on the same terms shall not equally belong to all citizens; this not being applicable to a business which may lawfully be prohibited.

From Multnomah: MELVIN C. GEORGE, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by Harry Sandys and others against George H. Williams, as mayor of Portland, H. W. Hogue, as municipal judge, Charles H. Hunt, as chief of police, and Ben Biglin, as harbor master of that city, to enjoin the enforcement of a municipal ordinance. The complaint states, in effect, that prior to June 1, 1904, plaintiffs, having secured licenses therefor, then were and now are severally engaged in conducting in Portland either a restaurant or a saloon, and at great expense had erected in connection with their respective places of business, private rooms, booths, and alcoves, in which they supplied their guests and the general public with food and drink; that the common

council of that city passed an ordinance June 1, 1904, which, so far as deemed involved herein, is as follows:

"Section 1. No person engaged in selling spirituous, malt or fermented liquors or wines in quantities less than one quart in any saloon, barroom or restaurant in the City of Portland, shall sell any liquor to be delivered or used or that shall be delivered or used in any side room, back room, upper room or other apartment in the same or an adjoining building, and shall not maintain therein or connect therewith any alcove, booth or box * * provided, that nothing herein contained shall prohibit the serving of such liquor to guests in a hotel having a valid license to sell the same.

"Sec. 2. It shall be unlawful for any person to conduct, carry on, open or maintain any restaurant, barroom or saloon within the City of Portland that has connected therewith any box, booth, stall or any private room; provided, however, that this section shall not apply to a private room having a floor space of more than 160 square feet, nor shall it apply to restaurants in which spirituous, malt or fermented liquors or wines are not sold and in which such box, booth, stall or private room is so constructed as to be entirely open upon the side facing any hall, hallway, passageway or room, and the sides thereof do not exceed seven feet in height": Rev. Ord. Portland 1905, p. 438.

The complaint further states, in substance, that defendants are officers of the city, whose duty it is to make complaints against and prosecute persons for violating municipal laws; that, if the provisions quoted be enforced, it will work a revocation of plaintiffs' licenses, to forfeit which the council is powerless, except for a violation of the terms upon which they were issued, and plaintiffs have not broken any of the conditions thereof; that the ordinance in question is unconstitutional, in that it attempts to grant to certain citizens privileges and immunities which upon the same terms do not equally belong to all citizens, and is void because it is unreasonable and oppressive; that the defendants threaten to, and will, unless restrained, complain against plaintiffs, causing them to be arrested, prosecuted, and punished if they continue to conduct the business in which they are severally engaged; that the keeping of restaurants and of saloons

is lawful, and plaintiffs have invested large sums of money in such business, and in erecting and furnishing rooms, alcoves, boxes, and booths in connection with their several places of traffic, and thereby have built up a substantial trade; that, if such threats are executed, plaintiffs will be deprived of vested property rights, causing irreparable injury, to indemnify which the defendants are not financially responsible, and for their acts in this respect the city is not liable; and that plaintiffs have no plain, speedy, or adequate remedy at law.

A demurrer to the complaint on the ground that it did not state facts sufficient to entitle plaintiffs to the relief demanded having been sustained, and no amendment to the pleading having been made, the suit was dismissed, and they appeal.

AFFIRMED.

For appellants there was an oral argument with a brief by *Mr. Martin L. Pipes* and *Mr. John F. Logan*, to this effect.

I. The enforcement of a penal city ordinance will be enjoined where the ordinance is unreasonable and tends to destroy property, to impair vested rights, or to work irreparable injury: *Barthet v. City*, 24 Fed. 563; *Tuchman v. Welch*, 42 Fed. 548; *Nelson v. State Board*, 22 Ky. (6 B. Mon.), 438; *Hall v. Schultz*, 31 How. Pr. 331; *Platte & D. Milling Co. v. Lee*, 2 Colo. App. 184 (29 Pac. 1036).

II. Where a business is not prohibited by the State, a city council deriving its power from that State cannot harass those engaged in such business, through unreasonable, oppressive or arbitrary restrictions, under the guise of exercising its delegated "power to regulate": *Steffy v. Monroe City*, 135 Ind. 466 (41 Am. St. Rep. 436); *Champer v. Greencastle*, 138 Ind. 399 (24 L. R. A. 768); *Bennett v. Pulaski* (Tenn., not officially reported), 47 L. R. A. 278.

III. Ordinances must be uniform in their application, and affect all persons alike under similar conditions: *Simrall v. Covington* (Ky.), 9 L. R. A. 556; *Bills v. Goshen*, 117 Ind. 221 (3 L. R. A. 261); *Monmouth v. People*, 183 Ill. 634; *Ex parte Wygant*, 39 Or. 429 (87 Am. St. Rep. 673, 54 L. R. A. 636, 64 Pac. 867).

For respondents there was an oral argument by *Mr. John P. Kavanaugh*, with a brief over the names of *L. A. McNary*, City Attorney, and *J. P. Kavanaugh*, to this effect.

1. The State has by the charter of 1903 delegated to the City of Portland all the police power it possessed except such as is specially reserved, and that power may be exercised by the city to the same extent that the State might have exercised it within the corporate limits: *Port. Charter 1903, Sec. 73, subds. 1 and 48, and Sec. 74; Dareentel v. Slaughterhouse*, 44 La. Ann. 632; *Ex parte Tuttle*, 91 Cal. 589. This being so, the city is not subject to judicial supervision any more than the State is: *Villavaso v. Barthet*, 39 La. Ann. 252; *Taylor v. Carondelet*, 22 Mo. 110; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; *Monson v. Shawneetown*, 77 Ill. 533.

2. The city having entire control over the whole subject of intoxicating liquors, has the power to permit the sale on such terms and conditions as may seem appropriate: *Ex parte Tuttle*, 91 Cal. 589; *Schwuchow v. Chicago*, 68 Ill. 444; *Gunnarsohn v. Sterling*, 92 Ill. 569; *Burckholter v. McConnellsville*, 20 Ohio St. 308.

3. The rule that where there is a general grant of power without a direction as to the mode of its exercise, the acts done under the grant must be "reasonable," does not apply where all the police power of the State is conferred on the municipality (*City of Danville v. Hatcher*, 101 Va. 523); but is applicable only when part of the police power is conferred, or the ordinance is passed under an implied or incidental power: *Car Float v. Jeffersonville*, 112 Ind. 15; *Shea v. Muncie*, 148 Ind. 14; *McQuillan, Munic. Ord.*, § 121, et seq.

4. Municipal councils have a large discretion in the application of the police power, and that discretion will seldom be reviewed: *Cooley, Const. Lim.* (7 ed.), 556; *State v. Loomis*, 115 Mo. 373.

5. The restaurant business is a proper subject of regulation and the council had power to prescribe the kinds of apartments that might exist in restaurants where no liquor is sold: *Munn v. Illinois*, 94 U. S. 113; *State v. Clarke*, 28 N. H. 176 (61 Am. Dec. 611); *State v. Freeman*, 38 N. H. 426.

6. The purpose of this ordinance being to advance the public welfare and morals, the enactment is not void because its incidental effect is to allow boxes or private rooms to be maintained in some places of business though prohibited in other resorts of the same kind: *Ex parte Tuttle*, 91 Cal. 589; *Des Moines v. Keller*, 116 Iowa, 648 (57 L. R. A. 243, 93 Am. St. Rep. 268); *Klug v. Georgia*, 77 Ga. 731 (4 Am. St. Rep. 106); *People v. Lewis*, 86 Mich. 273; *Goddard, Petitioner*, 16 Pick. 504 (28 Am. Dec. 259).

7. The ordinance in question (14029) does not forfeit plaintiffs' licenses. The city always has a right to regulate and control generally businesses which it has licensed: *St. Charles v. Hackman*, 133 Mo. 634; *Bishoff v. State ex rel.* 43 Fla. 67 (30 So. 808).

The local option law does not repeal all local restriction on the subject of intoxicating liquors. The language of the act indicates that local enactments are to continue in force until suspended by the vote of the electors under the act. Since the commencement of this suit the electors have defeated local prohibition in the county and precincts in which plaintiff's places of business are located.

MR. JUSTICE MOORE delivered the opinion of the court.

It is insisted by plaintiffs' counsel that the local option liquor law adopted by the people at the general election held June 6, 1904, in pursuance of initiative petitions (Laws 1905, p. 41, c. 2), deprives the common council of Portland of the power to license, regulate, or restrain the sale of intoxicating liquors in that city, and, this being so, the ordinance complained of is void, and an error was committed in sustaining the demurrer to the complaint. It is argued that the old law and the new cannot both exist at the same time, and that the local option act, being the latest expression of the direct will of the people, supersedes all prior legislation on the subject to which it relates. The act of the people adverted to does not in express terms attempt to repeal any other law. The rule in this State is that, though repeals by implication are not prohibited by the constitution (*Grant County v. Sels*, 5 Or. 243; *Warren v. Crosby*, 24 Or.

558, 34 Pac. 661), they are not favored in law or allowable, except where the inconsistency and repugnancy between a prior and a subsequent act on the same subject are plain and unavoidable: *McLaughlin v. Hoover*, 1 Or. 31; *State v. Rogers*, 22 Or. 348 (30 Pac. 74); *Continental Ins. Co. v. Rigger*, 31 Or. 336 (48 Pac. 476). Where, however, the enactment is a new and independent law, revising some previous policy of the State, or altering the whole subject of a prior statute, and evidently intended as a substitute therefor, although containing no abrogating clause, the later act will operate as a repeal of the old law by implication: *State v. Benjamin*, 2 Or. 125; *Fleischner v. Chadwick*, 5 Or. 152; *Little v. Cogswell*, 20 Or. 345 (25 Pac. 727); *Strickland v. Geide*, 31 Or. 374 (49 Pac. 982); *Ex parte Fardon*, 35 Or. 171 (57 Pac. 376); *Ladd v. Gambell*, 35 Or. 393 (59 Pac. 113); *Reed v. Dunbar*, 41 Or. 509 (69 Pac. 451). If two statutes relating to the same subject are inconsistent, the later law furnishes the rule of action; and, though it contains no revoking words, it repeals the prior act by implication, so far as the conflict is concerned: *Hurst v. Hawn*, 5 Or. 275; *Smith v. Day*, 39 Or. 531 (64 Pac. 812, 65 Pac. 1055). If a later statute, however, only modifies a prior law, the two must be taken together as one act: *Winter v. Norton*, 1 Or. 43; *Bower v. Holladay*, 18 Or. 491 (22 Pac. 553); *Winters v. George*, 21 Or. 251 (27 Pac. 1041). A subsequent act not embracing the entire ground of an earlier statute, and not clearly designed as a substitute therefor, will not repeal the prior act unless its provisions are so repugnant to it that both cannot stand: *Booth's Will*, 40 Or. 154 (61 Pac. 1135, 66 Pac. 710). In the case last cited, Mr. Chief Justice BEAN, discussing the interpretation of statutes, says: "It is therefore the duty of the court to adopt any reasonable construction that will give effect to both acts, and, in order that one may have the effect of repealing another by implication, its conflict with the former act must be 'so positive as to be irreconcilable by any fair, strict, or liberal construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving at the same time the force of the earlier law, and construing

both together in harmony with the whole course of legislation on the subject.' ”

1. Keeping these rules in view, the charter of the City of Portland, approved January 23, 1903 (Sp. Laws 1903, p. 3), and the local option law, will be examined, to ascertain if the latter repeals the former by implication, so far as it relates to the subject of intoxicating liquors.

The charter contains the following provisions on that topic: “The council has power and authority * * to grant licenses * * and to provide for the revoking of the same”: Sec. 73, subd. 21. “To regulate and restrain bartenders, saloon keepers, dealers in and manufacturers of spirituous, vinous, fermented or malt liquors, barrooms, drinking shops, or places where spirituous, vinous, fermented, or malt liquors are kept for sale, or in any manner disposed of, and the sale and disposal thereof”: Sec. 73, subd. 48. The local option law provides, in effect, that whenever a petition therefor has been filed with the county clerk for an election in any county or a subdivision thereof, consisting of one or more entire and contiguous precincts, which may also embrace the whole or a part of any incorporated town or city, the county court of such county shall order an election to be held, to determine whether the sale of intoxicating liquors shall be prohibited in the designated territory: Sec. 1. When an election has been held in pursuance of the provisions of this act, the county clerk shall canvass the returns and make an abstract of the votes, and, if a majority thereof are for prohibition, the county court shall make an order declaring the result, and prohibiting the sale of intoxicating liquors within the prescribed district: Sec. 10. When such order has been regularly made, any person who thereafter, within the inhibited territory, sells, exchanges, or gives away any intoxicating liquors, shall be subject to prosecution, etc.: Sec. 15.

The adoption of the local option law was the enactment of a new statute relating to intoxicating liquors, but a perusal thereof will show that it was not intended as a substitute for the earlier law, but only as a modification thereof when its provisions become applicable to a specified district by a majority vote of the qualified electors. The county courts of the several counties of

this State are authorized to license the sale of intoxicating liquors outside incorporated towns and cities, but, before such permission can be granted, the applicant therefor is required to file a petition signed by an actual majority of the whole number of legal resident voters of the precinct in which he desires to carry on the business: B. & C. Comp. §§ 3854-3864, as amended by an act approved February 24, 1903: Laws 1903, p. 169. A majority vote for prohibition, cast in pursuance of an election held in any county or subdivision thereof, under the local option law, is tantamount to a remonstrance against the granting of a license by the county court; thereby preventing the sale of intoxicating liquors in any precinct in the designated district until the vote has been regularly changed at a subsequent election so as to be against prohibition. The local option law is therefore only a modification of the earlier statute relating to the mode of protesting against the granting of licenses to sell intoxicating liquors. The charter of Portland does not require an applicant for a liquor license to secure the signatures of any other person to his petition, nor is a remonstrance thereto necessary, the council evidently being authorized to grant the license at the request of the petitioner, and his compliance with the terms of any reasonable ordinance that may be passed relating to the subject. The refusal of a license in an incorporated town or city, in pursuance of a majority vote for prohibition, under the provisions of the local option law, is a modification of the prior acts generally applicable to municipal corporations; but, as such law was not intended to be operative until the expediency or in expediency of granting licenses was determined by a popular vote, we think that, when the enactment by the people is considered as an entirety, it shows that it was not designed as a substitute for the former law, and hence does not repeal the prior acts by implication.

2. The question not being involved herein, it is unnecessary to determine whether or not the local option act violates Const. Or. Art. I, § 21, which is as follows: "No ex post facto law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided

in this constitution; provided, that laws locating the capital of the State, locating county seats, and submitting town and corporate acts, and other local and special laws, may take effect or not, upon a vote of the electors interested." Though there is quite a conflict of judicial expression as to the validity of a local option law, the enforcement of which in a particular locality is made to depend upon the popular will, as expressed by a vote of the people interested therein or affected thereby, the weight, in our opinion, supports the doctrine that such an act should be upheld as a legitimate exercise of the police power: *Cooley*, Const. Lim. (7 ed.), p. 174. "The legislature," says Mr. Justice AGNEW in *Locke's Appeal*, 72 Pa. 491, 498 (13 Am. Rep. 716), "cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things, upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation. Hence the necessity of the municipal divisions of the State into counties, townships, cities, wards, boroughs, and districts, to which is committed the power of determining many matters necessary or merely useful to the local welfare. Can any one distinguish between committing the determining power to the authorities of the district and to the people of the district? If the power to determine the expediency or necessity of granting licenses to sell liquors in a municipal division can be committed to a commission, a council, or a court, which no one can dispute, why cannot the people themselves be authorized to determine the same thing? If a determining power cannot be delegated, then there can be no power delegated to city councils, commissioners, and the like, to pass ordinances, by-laws, and resolutions in the nature of laws, binding and affecting both the persons and property of the citizens. If a determining power cannot be conferred by law, there can be no law that is not absolute, unconditional and peremptory, and nothing which is unknown, uncertain and contingent can be the subject of law." This matter is adverted to only in aid of

the conclusion reached that the local option law was not intended as a substitute for or to supersede the prior legislation on the subject to which it relates, but only is a modification thereof when the provisions of such law are made applicable to a county or a subdivision thereof by a majority vote of the electors.

3. It is contended by plaintiffs' counsel that the ordinance interdicting the sale of intoxicating liquors in any side room, upper room, or other apartment, etc., is an exercise of the implied power of the council, and as such is an unreasonable, arbitrary, oppressive, and a vexatious restriction, unwarranted by the charter of Portland, and, if put into execution, will compel plaintiffs and all others similarly situated, who at great expense have constructed such rooms, to remove the partitions thereof, defacing the buildings, causing excessive damages, and unlawfully depriving them of vested rights, to prevent which, and to restrain the defendants from executing their threats to enforce the provision of the ordinance, plaintiffs were entitled to an injunction, and that an error was committed in sustaining the demurrer to the complaint and in dismissing the suit. It is maintained by defendants' counsel, however, that men meet women by appointment in, or take them to, the small, closed rooms of saloons and of restaurants, for dissolute purposes, and that the city council, exercising a measure of the police power of the State with which they are clothed, possessed ample authority to regulate such places in the interest of good morals. Equity will not enjoin the action of municipal corporations while proceeding within the limits of their well-defined powers as fixed by law, but it has undoubted jurisdiction to restrain them from acting in excess of their authority, and from the commission of acts which are *ultra vires*: 2 High, Injunctions (3 ed.), § 1241. Where criminal prosecutions under color of a void law are threatened, which act, if enforced, would deprive a party of a property right, a preliminary injunction may properly be issued to prevent the menaced injury: 1 Spelling (2 ed.), § 24. Equity has jurisdiction to interpose by injunction where public officers, under a claim of right, are proceeding illegally

to injure the property of individuals or corporations: *Smith v. Bangs*, 15 Ill. 399; *Barthet v. New Orleans* (C. C.), 24 Fed. 563; *Tuchman v. Welch* (C. C.), 42 Fed. 548.

4. The right to enjoin the threatened execution of illegal municipal acts that affect property rights being unquestioned, is the ordinance complained of so clearly unreasonable as to entitle plaintiffs to the extraordinary remedy invoked? It will be remembered that the council of Portland has express legislative authority "to license" the sale of intoxicating liquors, and also "to regulate and restrain" dealers therein and places where such liquors are kept for sale. The charter confers upon the council the following authority: "To exercise within the limits of the City of Portland all the powers commonly known as the police power, to the same extent as the State of Oregon has or could exercise said power within said limits": Portland Charter 1903, § 73, subd. 1. "To make and enforce within the limits of the city all necessary * * police * * laws and regulations": Portland Charter 1903, § 73, subd. 2. This grant of power carries with it by implication, and as a necessary incident, authority to the council to pass any ordinance that reasonably tends to suppress the evil which might result from a secluded association of the sexes in small rooms, and which law is also intended to correct the morals of the visitors to these resorts, who might, in the absence of any regulation, become debased by such companionship, when their passions are inflamed and their judgments temporarily dethroned by the excessive use of alcoholic beverages: *McQuillin*, Munic. Ord. § 430; *Portland v. Schmidt*, 13 Or. 17 (6 Pac. 221); *Hubbard v. Medford*, 20 Or. 315 (25 Pac. 640).

"Many attempts," says Mr. Chief Justice WAITE in *Stone v. Mississippi*, 101 U. S. 814 (25 L. Ed. 1079), "have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals." Much has been said in respect to the limits of police

power, but no text-writer or court of last resort has definitely established its confines. Its boundary must therefore be co-extensive with, and measured only by, the necessity which calls for its exercise. To this extent the State may employ such power, or it may delegate the whole or a part thereof to a municipal corporation, as its subordinate agent, which is authorized to exercise within a designated territory the measure of sovereignty granted. If express legislative authority is conferred upon a city council to pass ordinances of a specified kind, and the power delegated does not contravene common right or trench upon constitutional restrictions, a municipal law passed in pursuance of such authority cannot be set aside by the courts on the ground that it is unreasonable, because legislative assemblies, and not courts, are ordinarily the judges of the necessity that calls for an application of the power. "But where the power to legislate on a given subject," says Judge Dillon in his work on *Municipal Corporations* (3 ed. § 328), "is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." It will be remembered that the power to make and enforce within the limits of the City of Portland all necessary police laws and regulations is expressly conferred upon the council, but the mode of exercising this power is not prescribed by directing the specified ordinance that may be passed, in the absence of which the authority to pass the law in question is incidental only, and the municipal regulation enacted in pursuance thereof must be set aside if it is found to be unreasonable.

The unreasonableness of the ordinance must be determined by considering whether or not a necessity existed for its passage; thereby demanding an exercise of such a measure of the police power as is sought to be employed. In *State v. Barge*, 82 Minn. 256 (84 N. W. 911, 53 L. R. A. 428), it was held that an ordinance of the City of Minneapolis prohibiting licensed liquor dealers from constructing or maintaining, with screens, curtains, or partitions of any kind, any stall, booth, or other inclosure of any kind in or connected with any room or place in any building wherein any kind of intoxicating liquor was sold or

disposed of, was not an unreasonable exercise of the power to "license and regulate * * all persons vending, dealing in or disposing of spirituous, vinous, fermented or malt liquors," and also "full power and authority to make, ordain, publish, enforce, alter, amend or repeal all such ordinances for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime." In deciding that case, Mr. Chief Justice START, in speaking of the ordinance, says: "It is a fact of which we may take judicial notice that opportunities for men and women, old or young, to lounge, drink, and carouse in secrecy, free from the observation of the police and of all other persons, are demoralizing in the extreme, and directly tend to drunkenness, licentiousness, and the corrupting of unwary youth. The existence of any drinking booth, stall, or other like inclosure, with screens, curtains, or partitions, within the room named in the license for the sale of intoxicating liquors, affords just such opportunities. The ordinance in question was intended to give effect to the general legislative policy of the State, of localization and publicity for the business of retailing intoxicating drinks, and to prevent the evils incident to secret lounging and drinking places, and it must be construed so as to give effect to such intentions."

In the case at bar, if the maintenance by plaintiffs of private rooms in saloons and in restaurants, where intoxicating liquors are sold, is adopted as a business of pandering to the social vices of their customers, such pursuit renders these resorts amenable to the jurisdiction of the police power, because illegal sexual indulgence involves an injury to society: 1 Tiedeman, State & Fed. Control, p. 185. If these private rooms or "boxes" are used for immoral purposes, of which fact the council of Portland ordinarily were the proper judges, they had ample authority, as an incident to the power granted, to pass any ordinance that would reasonably tend to correct this evil; and, as the necessity for enactment of the municipal law existed, its provisions are therefore not unreasonable, when the size of the city and the urgent need of such a regulation are considered: Dillon, Munic. Corp. (3 ed.), § 327.

Nor do we think the ordinance was designed to harass those engaged in the liquor traffic, as an arbitrary, oppressive, or vexatious restriction, for the business can be continued notwithstanding a sale or delivery of intoxicating liquors in "boxes" is forbidden. In discussing this branch of the case, we have not overlooked the fact that the inhibition of the sale of such liquors to be delivered or used in any side room, etc., is not an entire prohibition of the traffic, and hence the ordinance is not in contravention of the charter of Portland; assuming, without deciding, that the power to license, regulate, and restrain the sale of intoxicating liquors does not authorize the passage of an ordinance prohibiting such sales: *Black, Intox. Liq.* § 227; *In re Schneider*, 11 Or. 288 (8 Pac. 289); *Portland v. Schmidt*, 13 Or. 17 (6 Pac. 221); *Houck v. Ashland*, 40 Or. 117 (66 Pac. 697).

5. It is maintained by plaintiffs' counsel that as the ordinance in question expressly exempts the keepers of hotels from its operation, thereby permitting the serving of intoxicating liquors to their guests in private rooms, but denies such privilege to persons engaged in the business of conducting a saloon or restaurant, it thereby violates Section 20 of Article I of the constitution of this State, by granting to hotel keepers having a valid license to sell intoxicating liquors privileges which upon the same terms are denied to all other persons occupied in similar employments. "An ordinance," says a text-writer, "cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by legislative grant": *Dillon, Munic. Corp.* (3 ed.), § 325. The right to sell intoxicating liquors, however, is not one of the privileges guaranteed to the citizens of the United States by the fourteenth amendment to the federal constitution: *Bartemeyer v. Iowa*, 85 U. S. (18 Wall.) 129 (21 L. Ed. 929); *Mugler v. Kansas*, 123 U. S. 623 (8 Sup. Ct. 273, 31 L. Ed. 205); *Kidd v. Pearson*, 128 U. S. 1 (9 Sup. Ct. 6, 32 L. Ed. 346). The authority of a State, by proper legislation, to regulate or prohibit the sale of intoxicating liquors, is regarded as a proper exercise of exclusive police power: *Cooley, Const. Lim.* (7 ed.), p. 849. In *White v. Holman*, 44 Or. 180 (74 Pac. 933), in commenting upon the clause of our organic law now under consideration, it was said: "It is the

danger to the public health, peace, or morals which is imminent or reasonably to be apprehended from the pursuit of any calling that renders the regulation or prohibition thereof by the State an exercise of its police power to avert the threatened peril. The degree of danger to the public is the measure of the remedy which the State may adopt to mitigate or prevent injury to its citizens. If the employment is only incidentally hurtful, it may be regulated by license, but, if it is necessarily pernicious, it may be entirely prohibited. However partial it may seem, the State can create a monopoly of any business that may lawfully be prohibited by it on the grounds of public policy, without violating any constitutional inhibition, because no person possesses an inherent right to engage in any employment, the pursuit of which is necessarily detrimental to the public." The language thus quoted was based on a consideration of the legal principle announced in *Plum v. Christie*, 103 Ga. 686 (30 S. E. 759, 42 L. R. A. 181), where it was held that a State might create a monopoly in any business in the pursuit of which a person was not authorized to engage as of common right. To the same effect is *State ex rel. v. Aiken*, 42 S. C. 222 (20 S. E. 221, 26 L. R. A. 345).

Mr. Justice FIELD, in *Crowley v. Christensen*, 137 U. S. 86 (11 Sup. Ct. 13, 34 L. Ed. 620), speaking for the court in relation to the police power of a State, says: "There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils." As the selling of intoxicating liquors to be used as a beverage may injure society and impose a burden upon the State, it is uniformly held that no person can engage in that business of common right, as in the sale of necessary commodities; and reason supports the rule that, unless such right exists, the State or its subordinate agent, a municipal corporation, when duly authorized by a sufficient grant of power by the legislative assembly, may confer a privilege on one class of persons which it denies to all others. Hotels are provided with private

rooms which are in effect leased to guests, where they can secure lodging, and one of the rules prevailing at such places of entertainment is that persons occupying apartments therein are required to register their names before they are entitled to any accommodation. A man and a woman having possession of or occupying the same bedroom in a hotel generally announce by the public register their marital relation. The persons who go to saloons and to restaurants are not usually required thus publicly to proclaim their visits, and it may have been a knowledge of these methods of keeping a record in one case, and of maintaining secrecy in the other, that induced the council of Portland to exempt hotels from the provisions of the ordinance in question. It is needless, however, to speculate upon the motives that brought about the immunity adverted to, for the city council, having plenary power under the provisions of the charter of Portland, could exempt hotels from the operation of the ordinance in question without violating any constitutional inhibition.

Other questions are presented in plaintiffs' brief, but, deeming them either not involved or unimportant, they are not considered.

The complaint, in our opinion, did not state facts sufficient to constitute a cause of suit, and, no error having been committed in overruling the demurrer, the judgment is affirmed.

AFFIRMED.

Argued 29 March, decided 28 April, 1905.

STATE v. LAUTH.

80 Pac. 660.

CRIMINAL LAW—SUDDEN FRENZY NOT INSANITY.

1. A sudden and frenzied paroxysm of anger or jealousy is not insanity in one otherwise in possession of his mental faculties, unaffected by heredity or disease, and does not relieve him from responsibility for crime.

JEALOUS RAGE—INSTRUCTIONS AS TO CRIMINAL RESPONSIBILITY.

2. A statement by the trial judge that jealous anger at the conduct of one's mistress is not insanity, and that the difference between the two is quite clear, is not error, particularly where the judge further offered to receive evidence tending to show insanity, or the condition of defendant's mind, together with information that had been communicated to him, and having instructed that the jury had a right to consider the condition of defendant's mind at the time of the homicide, as bearing on the degree of the offense.

TRIAL—QUALIFICATION OF JUROR AFTER TRIAL.

3. The conclusion by the trial judge as to the qualifications of a juror, when attacked by a motion for a new trial, or on appeal, will be set aside only when there has been an abuse of discretion.

REVIEWING QUALIFICATION OF JURORS AFTER TRIAL.

4. Where, after verdict, the proofs which are produced for and against the qualifications of a juror are conflicting, and of somewhat even balance, the court's conclusions will not be disturbed unless they may result in manifest injustice.

DETERMINING QUALIFICATION OF JURORS BEFORE TRIAL.

5. If a venireman should falsely state on his voir dire his interest or position, or should misstate or conceal a material relevant fact, he would be guilty of prejudicial misconduct.

EXAMPLE OF DISCRETION—QUALIFICATION OF JUROR.

6. On a prosecution for murder, defendant moved for a new trial on the ground that a juror had made false answers, in that he had stated that he had never heard anything about the case. Defendant produced an affidavit that affiant, shortly after the coroner's inquest, met the juror in question, and talked with him, and told him all about the crime; and another affidavit stated that the juror admitted to affiant, in the presence of the one who had made the first affidavit, that the juror had talked with the latter about the case prior to the trial. The affidavit of the juror stated that he had no recollection of having ever talked with any one about the crime, and that he had never admitted that he had done so; and another affidavit, made by the one who made the first-mentioned affidavit, stated that the juror never admitted in his presence that he had ever talked about the case. *Held*, that it was not an abuse of discretion to deny the new trial.

From Clackamas: THOMAS A. McBRIDE, Judge.

Geo. W. Lauth prosecutes this appeal from a sentence of death for killing Mrs. Leonora B. Jones at Oregon City.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Geo. Clayton Brownell* and *Mr. Grant B. Dimick*.

For the State there was a brief over the names of *Harrison Allen*, District Attorney, and *C. Schuebel*, with an oral argument by *Mr. Andrew Murray Crawford*, Attorney General, and *Mr. Allen*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The defendant was convicted of murder in the first degree for killing one Leonora B. Jones, his mistress, and adjudged to pay the penalty imposed by statute. He interposed the plea of insanity at the trial, and, with a view to establishing the defense, called Charles R. Noblitt, who related that he was at the depot in Oregon City the night before the killing; that he did not see the defendant there, but saw him a little while afterwards. Thereupon one of the counsel for the defendant stated that he desired to show the actions of the woman when she got off the train, with reference to another man, and that her conduct there was afterwards made known to the defendant, which

request the court denied, saying: "I do not think a man can set up, in a case of this kind, jealousy or anger or frenzy caused by jealousy—caused by the fact that a woman had abandoned him. I do not believe it is a good defense. If you can show this man was insane, it is a defense. But I do not think that the law recognizes that the abandonment of a man by his mistress is any legal provocation for taking her life. If you expect to offer any evidence tending to show that he was insane, the court will admit it."

Counsel then further stated that the woman came down on the train with certain parties, who were seen by two policemen, which fact was communicated to the defendant, and requested permission to show the subsequent acts of the defendant, answering which the court again ruled as follows: "I want to lay this down as the law: That a frenzy arising from jealousy or anger is not insanity. The difference between them, in law, is as wide as the poles. It is the duty of a man to control his passions, but he cannot control disease. I will admit anything that you can introduce to show the condition of this defendant's mind—anything that was communicated to him. As I say, what the fact might be would not be material, but what was communicated to him might be material, with a view of determining what kind of a mind he had."

Objections were saved to these rulings and form the basis of the first assignment of error.

1. Insanity, to excuse crime, must be such as dethrones reason and renders the subject incapable of discerning right from wrong, or of understanding or appreciating the extent, nature, consequences, or effect of his wrongful act: *State v. Murray*, 11 Or. 413 (5 Pac. 55); *State v. Zorn*, 22 Or. 591 (30 Pac. 317). It has been said that "a mere uncontrollable impulse of the mind, coexisting with the full possession of the reasoning powers, will not warrant an acquittal on the ground of insanity; the question for the jury being whether the prisoner, at the time he committed the act, knew the character and nature of the act, and that it was a wrongful one": *Regina v. Barton*, 3 Cox, C. C., 275, headnote. This appears to be the rule in England, The rule as it obtains in this country is lucidly but concisely

stated by Mr. McClain (1 Crim. Law, § 157) as follows: "As indicated in the preceding paragraph, there are some cases which lend countenance to the idea that an irresistible impulse to the commission of the crime will be an excuse; but in many cases, and, indeed, by a great weight of authority, irresistible impulse or uncontrollable passion is held not to be a defense. Where the criminal has sufficient mental capacity to distinguish between right and wrong, mere passion or frenzy produced by anger, jealousy or other passions will not excuse. There may, indeed, be insane impulses which are so far uncontrollable that there is no criminal liability therefor, but they must be shown to be the result of a diseased mind, and not merely of passion or impulse, though it is said in one case that uncontrollable impulses, due to provocation and disappointment, exaggerated by a disordered mind, might be taken into account to relieve the degree of homicide. But what is called moral or emotional insanity is distinctly repudiated as an excuse in perhaps all the cases in which such defense has been directly considered." In further support thereof, see *State v. Hansen*, 25 Or. 391 (35 Pac. 976, 36 Pac. 296); *Goodwin v. State*, 96 Ind. 550; *McCarty v. Commonwealth*, 24 Ky. Law Rep. 1427 (71 S. W. 656). Thus it is obvious that a paroxysm of jealousy, or sudden anger or frenzy of temper, provoked or superinduced by the intelligence that the accused had been abandoned by his mistress, the object of his lustful affections—he being otherwise in possession of his mental faculties, unimpaired by disease or unbalanced by heredity—will not relieve him of criminal responsibility; and the trial court's rulings or observations were in accord with this understanding of the law. The rule was pithily stated, with something of epigrammatical emphasis, but there was no purpose manifest of attracting any particular attention to that phase of the case any more than to any other.

2. The court distinctly stated that any evidence tending to show insanity would be admitted, and, to that end, that it would allow the acts and conduct of the defendant to be proven, as well as any communications made to him relative to the deportment of the woman. This gave ample scope for maintaining the defense interposed, and, when taken in connection with

the general charge that the jury had a right to take into consideration the condition of mind of the defendant at the time he committed the homicide, as bearing upon the degree of the offense of which he was guilty, it is manifest that there was no error of which he could complain.

The only other error assigned arises from the conduct of John Page, who sat on the jury. The following is his examination, and the answers elicited on his voir dire:

"Q. I will ask you if you have heard or read anything about this case?

A. No, sir

Q. Did you read anything about it in the newspapers at the time it is alleged to have happened?

A. No, sir; I believe not.

Q. You knew there was such a case on the docket, did you?

A. I did.

Q. I will ask you if, on or about the 6th day of September, when this alleged offense is supposed to have happened, if you heard the matter discussed any?

A. No, sir.

Q. Then you know nothing about what purports to be the facts in this case?

A. Not a thing.

Q. I will ask you, if you were accepted as a juror in this case, you'd be willing to go into the jury box and eliminate any impression, if you have one, as to the guilt or innocence of the defendant, and try the case solely upon the evidence, and the law as given you by the court?

A. Yes, sir."

Being accepted by the defendant, the district attorney further examined him as follows:

"Q. Have you any conscientious scruples against the infliction of capital punishment for murder?

A. Not at all

Q. Have you ever been a close friend of Mr. Brownell or Mr. Dimick?

A. No, sir.

Q. Are you acquainted with any of the witnesses in the case?

A. Carl is the only one I know. I don't know any of them, only Carl.

Q. Do you know any reason why you could not give both sides an absolutely fair and impartial trial?

A. I could.

Q. You could?

A. Yes, sir.

Q. Have you no opinion at all?

A. None whatever."

After verdict the defendant moved to set it aside and for a new trial on the ground, as alleged, that the juror made false answers to the questions thus propounded to him touching his qualifications to sit as a trior in the cause, and therefore he was not accorded a trial by a fair and impartial jury. To prove the falsity charged, the affidavits of Henry W. Trembath and G. B. Dimick, one of the counsel for the defendant, were produced. Trembath is a constable, and took charge of the defendant very soon after the tragedy; receiving him from the father of the deceased, who then had him in custody. He swears that, immediately after he received the defendant into his custody, the defendant informed him that his (defendant's) gun or pistol, which he then had in his pocket, contained only one loaded shell, and that he had shot four loads into the body of the deceased; that he (affiant) was subpoenaed as a witness, and testified before the coroner's jury relative to what the defendant had told him; that immediately after the inquest he met Page, the juror, in front of the courthouse, and there talked with him, and told him all about the shooting of the deceased, and also what the defendant had told him (affiant) in regard to the loaded and empty shells remaining in the pistol, and, in fact, all that he had testified to before the coroner's jury. Further, he swears that he related to him all the facts, as he (affiant) understood them, leading up to the homicide; that thereafter, about the last of September, 1904, affiant again met Page in the sheriff's office, and there talked with him about the shooting, wounding, and killing of the deceased by the defendant; that the affiant was in the courthouse when Page was drawn on the panel as a juror; that he was asked, while being examined touching his qualifications, if he was acquainted with any of the witnesses for the State (the names on the information being read to him at his request, that of affiant among the rest); and that he answered that Dr. Carll was the only one. The affiant further deposed that he had been acquainted with Page for a long time

prior to the date of the killing. Dimick deposes that on or about December 1, 1904, Page admitted to him, in the presence of Trembath, that he had talked with the latter about the case prior to the trial.

In refutation of this showing on the part of the defense, the State produced the affidavit of Page, and another from Trembath. Page avers that he has no recollection of ever having talked with Trembath or any other person about the shooting of deceased by defendant; that he had not at any time expressed an opinion as to the guilt or innocence of the defendant to any person or persons; that he had no knowledge of the facts, or of what purported to be the facts, relative to the homicide, prior to hearing the evidence at the trial; that he never admitted to having talked with Trembath or any other person about the facts of the shooting in the presence of Dimick and Trembath, or any other person or persons; that he never knew Trembath by the name of Henry W., but was slightly acquainted with him by the name of Harry, by which latter he was commonly known; and that, when the name Henry W. Trembath was read to him from the information, he did not know that it referred to the same person as Harry Trembath. Trembath avers that he was in the office of Dimick at the time referred to by the latter in his affidavit, and that Page never stated at that or any time, in his presence, or in the presence of Dimick and himself, that he had ever talked with Trembath about the case, nor did he in any manner admit the same. This constitutes all the material proofs pro and con touching the alleged misconduct of the juror.

3. The exact function of the trial court as a trier of a juror's qualifications before trial, and the principle upon which its action in that regard may be revised, have been firmly settled in this State: *State v. Saunders*, 14 Or. 300 (12 Pac. 441); *State v. Armstrong*, 43 Or. 207 (73 Pac. 1022). As the trier of a juror's qualifications after verdict, when attacked for bias or prejudice rendering him unfit to sit in the cause, the function of the court is much the same as when it is sitting to make the inquiry before trial. It is held to the exercise of a sound legal discretion, and is amenable to revision only when it has abused that discretion. The reason commonly assigned for the

rule is that the trial court has the opportunity of seeing the juror, of hearing him give his testimony, and of noting his manner and demeanor while under examination; thus affording it advantages superior for determining the matters of inquiry to those accorded the appellate tribunal, which is furnished only with the dry facts upon paper. The rule is otherwise stated as requiring clear and palpable proofs to warrant a reversal of the trial court's determination.

4. It follows, therefore, that, where affidavits and proofs are produced for and against, which are conflicting and contradictory, and of somewhat even balance, so that it requires a precise estimate to determine as to the greater weight or preponderance, the trial court's conclusions will not be disturbed, unless they may result in manifest injustice: 17 Am. & Eng. Enc. Law (2 ed.), 1209; *Ray v. State*, 15 Ga. 223, 241; *Brinkley v. State*, 58 Ga. 296; *Stewart v. State*, 58 Ga. 577; *Vann v. State*, 83 Ga. 44 (9 S. E. 945); *Long v. State*, 95 Ind. 481, 486; *Hodges v. Bales*, 102 Ind. 494 (1 N. E. 692); *Epps v. State*, 102 Ind. 539 (1 N. E. 491); *De Hart v. Etnire*, 121 Ind. 242 (23 N. E. 77); *State v. Lee*, 80 Iowa, 75 (45 N. W. 545, 20 Am. St. Rep. 401); *Wightman v. Butler County*, 83 Iowa, 691 (49 N. W. 1041); *Hull v. Minneapolis St. Ry. Co.* 64 Minn. 402 (67 N. W. 218); *Svenson v. Chicago, G. W. R. Co.* 68 Minn. 14 (70 N. E. 795); *State v. Gonce*, 87 Mo. 627; *Kennedy v. Holladay*, 105 Mo. 24 (16 S. W. 688); *State v. Dusenberry*, 112 Mo. 277 (20 S. W. 461); *State v. Howard*, 118 Mo. 127, 136 (24 S. W. 41); *State v. Taylor*, 134 Mo. 109, 161 (35 S. W. 92).

5. The rule, on principle, must necessarily be the same where the court is sitting to inquire touching alleged misconduct of a juror. Mr. Chief Justice ELLIOTT, in *Pearcy v. Michigan Mut. L. Ins. Co.* 111 Ind. 59, 61 (12 N. E. 98, 99, 60 Am. Rep. 673), says, with great force and obvious justice, that "the examination of a juror on his voir dire has a twofold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law. It is often important that a party should know the relation sustained by a person called as a juror to his adversary, in order that he may

interpose a challenge for cause, or exercise his peremptory right to challenge. It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact nor concealing any material matter, since full knowledge of all material and relevant matters is essential to a fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge": *Johnson v. Tyler*, 1 Ind. App. 387 (27 N. E. 643). The accused has a constitutional right to a trial by a fair and impartial jury, and ought not, therefore, to be compelled to submit to be tried by a juror who insinuates himself upon the panel by falsifying his oath. So we take it, without further inquiry or citation of authority, that if the juror Page, when asked on his voir dire if he had heard or read anything about the case, or if he had heard the matter discussed, or knew anything about what purported to be the facts in the case, or was acquainted with any of the witnesses, answered falsely, so as to deprive the defendant of his right of peremptory challenge, or of questioning him more rigidly relative to the real facts which might have influenced his mind and determined the court as to his competency as an impartial juror, then his acts amounted to misconduct manifestly prejudicial to the defendant, as they have deprived him of a clear legal right. We think, also, we may assume that the juror, by answering falsely, if such he did, had some ulterior motive to subserve. Whether it was to convict or to acquit the defendant is not apparent, but it does not matter—the result of his verdict was to convict—and who could say that he went into the box with a different purpose or wholly unbiased?

6. Did the juror, therefore, answer falsely? For such is the misconduct charged against him. The solution of this question depends almost entirely upon the affidavit of Trembath and the counter affidavit of Page. Between these there is a sharp conflict in statement. The juror has a right to be heard upon his own affidavit, and the trial court may look back to the examina-

tion on his voir dire, and, considering the whole, determine the controversy. As to the controlling feature sworn to by Trembath—that he had talked with Page, and told him about the pistol and the shells, and the facts as he understood them—Page replies by saying that he has no recollection of either circumstance, or of having talked with any one about the case prior to the trial. He might have denied by positive statement, which would have strengthened his defense, and, not having done so, it leaves an impression that he could not conscientiously so depose. It is hardly possible, however, that he should have forgotten within such a short space of time a matter which would naturally impress itself upon his mind, and it is a fair inference that he knew when he filed his affidavit whether Trembath had previously talked with him or not, and he is not to be excused on account of a short memory. When, therefore, he asserts that he retains no recollection of Trembath's having talked with him, the statement is persuasive and cogent in repudiation of the charges made by Trembath. Page's statement on the voir dire, however, is positive that he had never heard anything about the case, and knew nothing of the facts; and this was very recently after the conversation should have taken place, according to the showing of Trembath. Further, there is a weakness in Trembath's statement. He does not aver that Page made any reply when being told of the alleged facts of the killing, either by way of expressing an opinion, or letting fall any observation about the matter. One would naturally suppose that he would have said something affecting his qualifications as a juror, of a nature pertinent to have been set out along with the other facts. All this, however, by way of a discussion of the relative probabilities of truth in these contradictory and conflicting affidavits. The incident of Trembath's alleged acquaintance with Page is of minor moment, and is satisfactorily explained by the latter.

The affidavit of Mr. Dimick is admittedly disparaging to the juror's answers on his voir dire, but the latter denies the statement in positive terms, and Trembath, who was present at the time alluded to, corroborates the denial, so that, considering the whole testimony pro and con bearing on the dispute, there is

something of an even balance. It falls far short of a clear and palpable showing that the juror has been guilty of misconduct as alleged, and the trial court, with more favorable opportunity to detect imposition and discover truth, having passed upon the proofs, we must take it, under the authorities, that it has rightly and justly decided the question involved. We cannot, therefore, interfere with its legal discretion in the premises. *State v. Cook*, 84 Mo. 40, and *State v. Gonce*, 87 Mo. 627, afford apt illustrations and discussions of the consideration and weight to be accorded to conflicting affidavits introduced for the establishment of a fact in dispute. A trial of fact by affidavit is not so felicitous in the discovery of truth as where the witness may be subjected to the search of a cross-examination for the verification of his statements, and the ascertainment of any motive present that may go to the impairment of his credibility. Accordingly, courts have enjoined the observance of caution in acting upon testimony adduced by that method, and usually agree that the case should be distinctly and clearly made, where it is sought to have a verdict set aside and a new trial awarded, for it is, in a manner, impeaching the regularity of a judicial proceeding: *Hughes v. People*, 116 Ill. 330 (6 N. E. 55); *Spies v. People*, 122 Ill. 1, 264 (12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320); *Lamb v. State*, 41 Neb. 356 (59 N. W. 895); *Hill v. State*, 42 Neb. 503 (60 N. W. 916).

Finding no error, therefore, in the rulings of the circuit court, its judgment will be affirmed.

AFFIRMED.

Argued 26 January, decided 10 April, 1905.

PACIFIC MILL CO. v. INMAN.

80 Pac. 424.

CONTRACTS—INDEPENDENT SEPARABLE COVENANTS.

1. Defendant lumber company contracted with plaintiff corporation to subscribe for a certain amount of its capital stock; to be paid for in lumber. Plaintiff agreed to increase its capital stock, to merge its existing business into the new business, to secure land for a lumber yard, to contract with a railway company for the delivery of lumber from a dock, and to secure bona fide subscriptions for a certain amount of its increased capital stock; such subscriptions to be paid in full in from one to four months. Held, that this latter agreement was independent and separable, so that strict performance of it was not a condition precedent to a right to maintain an action for failure of defendant to perform its contract.

CORPORATIONS—ADMISSION OF GENUINENESS OF STOCK SUBSCRIPTION.

2. Where defendant and plaintiff corporation entered into a contract which, among other things, required plaintiff to increase its stock, and to obtain subscriptions to a part of it, failure of defendant, on receiving a list

of the subscribers, to object to a subscription purporting to have been made by a corporation, was an implied admission that the subscription was genuine.

CORPORATIONS—IMMATERIAL DEFENSE TO ACTION OF DAMAGES FOR NOT TAKING SUBSCRIBED STOCK.

3. Where defendant and plaintiff corporation entered into a contract which required plaintiff to increase its capital stock and procure subscriptions for a part thereof, the alleged fact that money paid in by the subscribers to the additional stock issue was not used by plaintiff in accordance with its contract with its stockholders was no defense to an action on the contract of defendant to subscribe to the stock.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Statement by MR. JUSTICE BEAN.

This is an action by the Pacific Mill Co. against Robert Inman and others, a corporation, to recover damages for a breach of a contract. The plaintiff is a Hawaiian corporation organized in 1900, with a capital stock of \$12,000, and with power to increase the same to \$50,000. The defendant is an Oregon corporation engaged in the business of manufacturing and selling lumber. In the spring of 1901, plaintiff, desiring to enlarge its business and to embark in the lumber trade, obtained from a local railway company an option on land for a lumber yard, and an agreement to transport lumber from the dock to the yard at a certain rate. It thereupon wrote to an agent of the defendant at Portland, with whom its officers had previously had some conversation concerning the lumber business, advising him that it had obtained an option for a lumber yard, and proposed increasing its capital stock to \$50,000; the present stockholders to retain their \$12,000, which was to be declared paid up; the remaining \$38,000 to be subscribed for by parties in Honolulu and by the defendant, and to be "called for as the same may be needed." Upon receipt of this letter, defendant sent Mr. H. R. Duniway to Honolulu, with authority to co-operate with plaintiff in organizing and launching the lumber business as outlined in the letter referred to, if, upon investigation, he found it desirable, and conditions as reported by plaintiff. Mr. Duniway arrived at Honolulu about the 1st of August, and on the 3d of that month, acting for defendant, made and entered into the following contract with plaintiff:

"This Agreement made and entered into this third day of August, A. D. 1901, by and between Inman, Poulsen & Company, a corporation duly incorporated and existing under and

by virtue of the laws of the State of Oregon, and having its office and principal place of business in the City of Portland, in the said State, hereinafter called the party of the first part, and The Pacific Mill Company, Limited, a corporation duly incorporated under and by virtue of the laws of the Territory of Hawaii, and having its principal office and place of business in Honolulu, in the said Territory of Hawaii, hereinafter called the party of the second part.

✓ "The party of the first part, its successors and assigns, in consideration of the sum of one dollar (\$1.00) and the covenants and undertakings hereinafter set out in this agreement, do hereby expressly covenant, promise, and agree to subscribe for and accept \$15,000.00 (fifteen thousand dollars) worth of paid-up shares of the capital stock of the party of the second part, and the said party of the second part hereby expressly covenants and agrees to accept in payment for said stock, Oregon pine lumber at the wholesale market and current prices to be fixed and mutually agreed upon subsequently.

"The said party of the second part, their successors and assigns, hereby expressly covenants and agrees that the party of the first part shall have the privilege and right to name and recommend one employee of the said party of the second part, and upon such naming and recommendation the person so recommended and named shall be elected a director of and in the Pacific Mill Company, Limited, and shall hold the office of secretary or manager of the lumber department of the said Pacific Mill Company, Limited, at a salary not to exceed one hundred and fifty (\$150.00) dollars per month for the first year, and that he or his successor shall hold and occupy said office.

"The parties hereto reserve the right to alter the amount of salary of the said person so appointed as aforesaid, and such compensation shall be fixed hereafter, subject to the success of the general business of the said Pacific Mill Company, Limited, while the party of the first part shall retain their interest in the said business and in the Pacific Mill Company, Limited, after the first year and upon the appointment of the person so named and recommended by the party of the first part after the expiration of the first year and the commencement of the second year of the appointment as aforesaid. And the said party of the first part shall have the privilege of recommending and naming permanently said director who shall be appointed by the said party of the second part.

"It is also agreed that the said party of the first part hereby covenants and agrees that they shall invoice all lumber that they may ship to the said party of the second part, at the current

wholesale market prices which may prevail from month to month on the Pacific Coast, and the cost of freight and making delivery of said lumber shall be added to this price, which will be subject to change from time to time, as will be mutually agreed upon, dependent on the bona fide changes in the wholesale lumber market on the Pacific Coast.

"The said party of the first part also covenants and agrees to attend to the chartering of all vessels necessary for the delivery of said lumber, and further covenants and agrees to furnish the said party of the second part all the Oregon pine lumber said company may require at the lowest wholesale current market prices.

"Said party of the second part, in consideration of the above undertakings and agreements and covenants to be performed by the said party of the first part, hereby agrees to increase the capital stock of the said Pacific Mill Company, Limited, to fifty thousand (\$50,000.00) dollars; also that the present business of the said Pacific Mill Company, Limited, including lease of mill, stock on hand, profits, tools, fixtures, good will, interest in contracts and total assets, shall be turned over and merged in the business of the said Pacific Mill Company, Limited, when the said capital stock shall be increased to fifty thousand (\$50,000.00) dollars, and the directors shall declare the present capital stock of the said Pacific Mill Company, Limited, to the amount of twelve thousand (\$12,000.00) dollars, to be fully paid up.

"The said party of the second part also covenants and agrees to secure the lease of certain railroad land and a contract covering the unloading of lumber and delivery of same by the said railroad company into the lumber yard as per the terms of option now held by the said Pacific Mill Company, Limited.

"The present stockholders and directors of the Pacific Mill Company, Limited, hereby agree to subscribe or secure subscriptions for the remaining capital stock of the said Pacific Mill Company, Limited, to the amount of twenty-three thousand (\$23,000.00) dollars, and they do hereby pledge themselves that such stock subscriptions shall be bona fide, and shall be paid for in one (1), two (2), three (3) and four (4) months, as may be called for by the board of directors from and after September 1, 1901. They also agree that this shall be done, and said details of increasing the capital stock and securing the land and contract shall be completed on or before September 1, 1901, and that the said Inman, Poulsen & Co., the party hereto of the first part, shall be notified in writing to this effect.

"The said party of the second part covenants and agrees that it will buy all its Oregon pine lumber from the said party of the

first part at the lowest wholesale current market prices prevailing on the Pacific Coast, and the said party of the second part also agrees to all the conditions of the said Inman, Poulsen Company to become stockholders of the said Pacific Mill Company, Limited.

"It is also agreed that in case the competitors of the said Pacific Mill Company, Limited, should cut and endeavor to regulate the price of lumber to about cost, or cost, or below cost, that the said Inman, Poulsen Company will allow the said Pacific Mill Company, Limited, a special rebate of \$1.00 (one dollar) per thousand from the lowest wholesale prices on merchantable lumber which are prevailing during the time of said cut on all stock sizes. By 'stock sizes' are meant

One inch lumber up to twelve inches wide.

Two inch lumber up to twelve inches wide.

Three inch lumber up to twelve inches wide.

Four inch lumber up to twelve inches wide.

Also 6x6, 6x8, 8x8, 10x10, and 12x12, regular lengths up to and including forty feet. Special sizes or larger and longer sizes than above, also clear lumber, are to be exempt from the special rate herein provided for.

"The said party of the first part, in consideration of the covenants and agreements herein being performed by the said party of the second part, does hereby appoint said Pacific Mill Company, Limited, exclusive agents of the said Inman, Poulsen & Co. for the Territory of Hawaii.

"In witness whereof the said parties hereto have hereunto set their hands and seals this third day of August, A. D. 1901.

Inman, Poulsen & Co.,

By H. R. Duniway, Agent.

Party of the First Part.

Signed and sealed in
the presence of

R. C. Geer,

W. H. G. Arnemann.

Pacific Mill Company, Limited,
Emmet May, President.
W. P. Barry, Secretary."

Immediately after signing the contract, plaintiff proceeded to comply with the provisions that were to be performed by it, increased its capital stock to \$50,000, opened stock books, obtained subscribers in Honolulu for \$23,000 of such stock, and by letter of August 13th advised the defendant that it was ready to receive lumber under the contract as soon as it could be shipped. This letter was not satisfactory to defendant, and on

the 27th it wrote for further information; asking, among other things, for a list of the names of the new subscribers; a written statement from some Honolulu banker as to the responsibility of such subscribers; a guaranty that the statement of assets and liabilities of plaintiff as made to Mr. Duniway was substantially correct; and for a modification of the contract so that alternate cargoes of lumber should be paid for in cash; stating that, immediately upon receipt of a satisfactory reply, defendant would proceed with the contract, and send a man to Honolulu to manage the business. To this letter the plaintiff replied on September 11, 1901, saying that the first assessment of \$5,000 on the stock had all been paid in, and that was a sufficient guaranty as to the balance; that the statement of the assets and liabilities of plaintiff as made to Mr. Duniway was correct; but declined to assent to the suggested modification of the contract, stating that it would take possession of the land for a lumber yard on the 1st of October, and would then be ready to receive and handle lumber; and requested the shipment of an assorted cargo. On the 7th of October, plaintiff again wrote, saying that it was disappointed in not receiving information by the last steamer as to the arrangements defendant had made concerning the shipment of lumber and carrying out its part of the contract; that plaintiff had accepted a lease of land for a lumber yard, and had entered into a contract with the railway company to build a switch to it; that it had a large number of orders for lumber already promised—and inclosed a copy of the subscription list to the new issue of stock, saying that it had made another assessment thereon of 25 per cent. About the time of the receipt of this letter the defendant sent another agent to Honolulu to examine the assets and liabilities of the plaintiff, and ascertain whether the contract had been complied with on its part. His report being favorable, the manager of the defendant and the president of the plaintiff thereafter met in San Francisco, and arranged for the charter of two vessels for the shipment of lumber from Portland to Honolulu. The lumber was shipped as agreed upon. It was, however, not consigned to the plaintiff, but to J. D. Young, an agent of the defendant, who was sent to Honolulu with full power to represent the defendant

in all business transactions between it and the plaintiff. Young arrived in Honolulu before the cargoes of lumber, and, upon investigation, concluded that the contract between plaintiff and defendant "was so honeycombed with fraud and misrepresentations" as not to be valid or binding on defendant, and on December 16, 1901, served a written notice on plaintiff, stating that defendant repudiated the contract and refused further to be bound thereby, for the reason that plaintiff had not complied with the terms thereof on its part to be kept, and that the representations upon the faith of which it was made were not true. The plaintiff thereafter commenced this action to recover damages for a breach of the contract. The complaint sets out the contract in substance and legal effect, and avers full performance thereof by plaintiff, and readiness and willingness to perform, and a breach by defendant. The answer denies the allegations of the complaint, and sets up certain matters as a defense not necessary to be detailed here. At the close of the plaintiff's testimony, the court granted a motion for a nonsuit, and the plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Ralph R. Duniway*.

For respondent there was a brief over the name of *Cake & Cake*, with an oral argument by *Mr. Harry Marion Cake*.

MR. JUSTICE BEAN delivered the opinion of the court.

From the bill of exceptions it appears that "the plaintiff introduced evidence tending to prove all the allegations of its complaint," unless the fact that it had collected on the new subscriptions to its capital stock but \$5,500 in September, \$187.50 in October, \$2,437.50 in November, and \$4,875 in December, 1901, shows such a failure to comply with the contract as authorized the defendant to repudiate it, and required the court to grant the motion for nonsuit.

There may be substantially three kinds of covenants or promises in a contract: first, such as are independent of each other; second, such as are mutual and concurrent, and are to be performed at the same time; and, third, promises or covenants which are conditional and dependent, the performance of one depend-

ing upon the performance of the other. In the character of contract first suggested, one party may bring an action against the other for a breach without averring and proving performance on his part. But in the other two, where the contract is entire, and the covenants go to the whole consideration, the plaintiff must show a performance, or that he was ready and offered to perform, before he can maintain an action against the other for a breach of the contract: 9 Cyc. 719. It is often difficult to determine the nature and character of the respective covenants of parties to a contract, and this difficulty has given rise to much apparent confusion in the decided cases. The early adjudications turn wholly upon the technical language of the contract. But the modern rule is that the contract should be construed according to the intention of the parties as gathered from its context and the good sense of each case. The question is one of construction, and, when the intention of the parties is not clearly expressed or is doubtful, certain rules of interpretation are applicable. One of these is that where the contract contains several separate and independent covenants, not covering the whole ground of the contract, and it has been executed or performed in part by one of the parties, a covenant of his going only to a part of the consideration, a breach of which may be paid for in damages, will be regarded as independent, performance of the contract as divisible, and he may maintain an action for a breach thereof by the other party without proving performance of such covenant: Note to *Pordage v. Cole*, 1 Saund. 320; Clark, Contracts, 653. Mr. Parsons, in speaking of this question, says that "if the supposed condition covers the whole ground of the contract, and cannot be severed from it or from any part of it, a breach of the condition is a breach of the whole contract, which gives to the other party the right of avoiding or rescinding it altogether. But where the supposed condition is distinctly separable, so that much of the contract may be performed on both sides, as though the condition were not there, it will be regarded as a stipulation, a breach of which only gives an action to the injured party": 2 Parsons, Contracts (9 ed.), *527.

1. Now, applying these rules to the case in hand, and bearing in mind the principle that the intention of the parties is to govern, the solution is easy. There is no stipulation in the contract, express or implied, that the defendant's obligation or liability was dependent upon the prior payment of the amount of the new stock subscriptions, or that any part of them should be paid in before the defendant should be required to begin the performance of the contract on its part. The language of the contract on this point is not happily chosen, but it seems to us that its purport is that plaintiff stipulated and agreed that it would procure bona fide subscriptions from its present stockholders and directors and other parties for \$23,000 of the new stock issue, and that such subscription should be paid for in one, two, three, and four months, as might be called by the directors, from and after September 1, 1901. But there is no statement that the payment of such subscriptions was a condition precedent to performance by defendant. The contract on the part of the plaintiff consisted of several distinct items, such as increasing its capital stock, merging its planing mill into the new enterprise, securing land for a lumber yard, contracting with the railway company for the delivery of lumber from the dock to the yard, securing bona fide subscriptions for \$23,000 of the capital stock, etc., and completing the details of such items by September 1, 1901, and notifying the defendant of that fact. Now, the plaintiff, relying upon the contract, proceeded at considerable expense and trouble to do all this, except collecting the entire amount due on the subscriptions to its capital stock; and, for the purposes of this case, it must be assumed to have performed all the other conditions on its part in good faith. The entire payments on such subscriptions were not to be made until December 1, 1901, and it can hardly be supposed that the parties contemplated that defendant should not perform any of the covenants on its part or begin such performance until that time. The mere default of the plaintiff in collecting the assessments in full, as levied, did not justify the defendant in repudiating or canceling the contract.

The stock subscriptions were *prima facie* valid and collectible, and constituted assets of the corporation. After the plaintiff,

relying on the contract, changed its business, enlarged its capital stock, and incurred liabilities, the defendant ought not to be permitted to repudiate and cancel it, in the absence of an express and clear stipulation entitling it to do so. If it had been intended that the entire amount of the new subscription should be paid into the treasury of the plaintiff before compliance with the contract by the defendant, it would, no doubt, have been so provided. This was not done, nor was any claim made by defendant during the protracted negotiations between it and the plaintiff, or at any time prior to the repudiation of the contract, that such was the understanding or agreement of the parties. Indeed, the entire dealings of the parties show to the contrary. The first letter from the plaintiff to defendant inviting it to cooperate in the establishment of a lumber yard said that the proposed subscription for the increased stock should be called as "the same might be needed," and the argument used by the defendant in its letter to the plaintiff of August 27th, asking for a modification of the contract so that alternate cargoes of lumber should be paid for in cash, was that, even under the modification suggested, "we will pay for all our stock by the time the other subscribers would have paid for about one half of theirs," and "in this way our firm will not pay for their stock in full much before the other subscribers pay for theirs." Under date of September 11, 1901, the plaintiff wrote the defendant that "75 per cent of the stock subscribed for here will be paid in by the time we get our first lumber," and again, on the 7th of October, that fifty per cent of the stock subscriptions had been called, and that it was the intention of the directors to call the balance "soon in order to have all the stock fully paid up by the time the lumber guaranteed you is received." This correspondence shows that both parties understood that lumber was to be shipped by the defendant to plaintiff in pursuance of its contract before the stock should be paid for in full. The motion for nonsuit on the ground suggested, therefore, was not well taken, and should have been overruled.

2. This disposes of all the questions strictly arising on this appeal, although there were others urged by the defendant's counsel. The bill of exceptions recites that the plaintiff gave

evidence tending to support all the allegations of its complaint, and therefore necessarily showed full performance on its part, except in the matter of collecting the amounts due on the stock subscription. The defendant, however, argues that the motion for a nonsuit was properly sustained, because one of the subscriptions purports to have been made by the Honolulu Investment Co., and there was no proof of its organization, or of its power to subscribe for stock in the plaintiff corporation; that the money paid on the stock subscription was not used by the plaintiff in accordance with the contract between it and the stockholders; that one of the stockholders had repudiated his contract, and refused to pay any amount thereon; and that plaintiff failed to show that all the subscriptions were bona fide. It is quite doubtful whether any of these questions are properly before the court. None of them appear from the bill of exceptions proper, and it is not clear that the court ought to go through a great mass of testimony attempted to be made a part of the bill of exceptions by mere reference to ascertain whether a positive and direct statement of a fact in the bill is erroneous. But however that may be, none of the questions proposed were sufficient to justify the motion. The proof is that the subscriptions to the capital stock are all genuine, and that all the subscribers have made a payment thereon, except one, and he refused solely because the contract between the defendant and the plaintiff was not being carried out. The subscription of the Honolulu Investment Co. was made by one purporting to be an officer of the corporation. The first assessment has been paid, and the subscription has never been repudiated. The defendant had knowledge thereof in October, 1901, when it was furnished a list of the subscribers, and again through the agent whom it sent to Honolulu to examine into the condition of affairs. Notwithstanding this knowledge, it made no objection to the subscription or its validity, and therefore it impliedly admitted its genuineness: *McCoy v. World's Columbian Expo.* 186 Ill. 356 (57 N. E. 1043, 78 Am. St. Rep. 288).

3. The charge that the money paid by the stockholders was not used by the corporation in accordance with the contract of subscription is controverted, but the defendant cannot refuse to

perform its contract on that account. The question is one between the stockholders and the corporation, or between the corporation and its officers. There is no provision in the contract between plaintiff and defendant that the money derived from the increased stock subscriptions should be kept intact. When it was paid in, it became an asset of the corporation, and subject to its disposal. If its officers have misapplied, wrongfully wasted or dissipated it, the defendant and the corporation are not without remedy, but it is no excuse for the defendant's refusal to abide by its agreement.

The judgment is reversed, and the cause remanded for a new trial.

REVERSED.

Argued 7 February, decided 10 April, 1905.

BROWN v. FELDWERT.

80 Pac. 414.

NOTES—ERASURE IN ADMITTED DOCUMENT.

1. The execution and delivery of an instrument being admitted, its production is unnecessary, and in case it is offered in evidence, an unexplained erasure is immaterial and does not affect its admissibility.

EFFECT OF DENYING MATTER NOT ALLEGED.

2. A denial of a statement not pleaded does not raise an issue, and no evidence should be permitted in support of it.

PLEADING FRAUD IN SIGNING WRITINGS.

3. It is absolutely essential in pleading that a signer of a paper was fraudulently misled as to what was being signed to show that such signer was free from negligence in the matter.

CURING DEFECT BY PLEADING OVER.

4. A defect or omission that can be cured by pleading over without objection must be one that is not imperatively essential to the cause of action.

NOTES—FAILURE OF CONSIDERATION AS A DEFENSE.

5. The defense that the consideration for a negotiable note failed is never available against an innocent purchaser.

EFFECT OF DENYING ADMITTED ALLEGATIONS.

6. A denial of an allegation of fact already admitted is not a denial at all—the pleading is controlled by the admission.

An example will illustrate this rule: In an action on a negotiable note, after the defendant has admitted that the payee, before maturity, indorsed, assigned and delivered the note to plaintiff for value, he cannot deny that plaintiff was an innocent purchaser for value, and plead affirmatively that there was no consideration for the note originally—the admission controls the denials.

PLEADING—ADMISSION OF NEGOTIABILITY.

7. An admission of the execution and delivery of a promissory note payable to a named person or order is an admission of the negotiability of such paper.

PLEADING—ADMISSION OF OWNERSHIP.

8. An admission that plaintiff acquired a certain note by indorsement and transfer from the payee is an admission of plaintiff's ownership.

AMENDMENTS—DISCRETION.

9. An application for leave to amend a pleading is addressed to the discretion of the trial court, and that discretion seems not to have been unjustly exercised in this instance.

From Lane: JAMES W. HAMILTON, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is an action by J. B. Brown against Theresa Feldwert and her husband on a promissory note. The plaintiff for cause of action alleges:

"That on or about the 22d day of June, 1901, at the City of Eugene, in the county of Lane, in the State of Oregon, the said defendants, Theresa Feldwert and Nic Feldwert, made their certain promissory note in writing, bearing date on that day, which said promissory note is in words and figures following, to wit:

"\$215.00.

Eugene, Cal., June 22, 1901.

"Eight months after date, for value received, I promise to pay Dr. Meyers & Co. or order, the sum of two hundred and fifteen dollars, with interest. Payable at San Francisco, Cal.

Theresa Feldwert.

Nic Feldwert."

"No. 5115. Due Feb. 22, 1902.

"And then and there delivered the said promissory note to the said Dr. Meyers & Co., who thereafter and before its maturity duly indorsed, assigned, and delivered said promissory note to the plaintiff herein for value. That the said plaintiff is now the lawful owner and holder of the said promissory note. That no part of the said promissory note or of the interest thereon has been paid. That there is now due and unpaid to the said plaintiff on said promissory note the sum of \$215, and interest thereon at the rate of 6 per cent per annum from the 22d day of June, 1901."

The defendants, without previous denials in any form, set out three separate defenses. By the first they admit the genuineness of the signatures to the paper, but they deny that they knew they were signing a promissory note, and allege that the paper was obtained from them and their signatures were attached thereto through and by reason of the false and fraudulent representations of one Dr. Meyers that it was an agreement to pay to him the sum named on condition and whenever he succeeded in effecting a permanent cure of a malady with which one of the defendants was afflicted; that, having confidence in him, because

he conversed in their own language (the German), and by reason of his appearance as a man of education and fair dealing, they were induced to sign the note, believing it to be the agreement as represented; and that, having been so fraudulently procured, they are not liable upon the same. By the second they admit they signed the paper, but allege that the sole and only consideration therefor was that one Dr. Meyers represented that he would treat one of the defendants for a malady with which she was afflicted, and that he would effect a permanent cure; that he never treated her or performed any services for her whatever; and deny that plaintiff is an innocent purchaser for value in the usual course of business before maturity, but allege that he is chargeable with all defects therein. And by the third defense they allege that the note is null and void because procured by fraud, as alleged in the first separate defense, and for the further reason that Dr. Meyers was not licensed to practice medicine in Lane County, and therefore not authorized to perform the services agreed upon, of which plaintiff had notice. The reply consists of general denials, and sets up affirmatively that plaintiff is the holder in due course of the note in question. A jury being called, the plaintiff submitted the note and rested, whereupon the defendants attempted to introduce evidence, but were not allowed to do so, and the court finally instructed the jury to return a verdict for plaintiff in the amount demanded, which being done, judgment was entered thereon, and the defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Harbaugh & Bower*, with an oral argument by *Mr. J. H. Bower*.

For respondent there was a brief over the name of *Thompson & Hardy*, with an oral argument by *Mr. Charles A. Hardy*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

1. There was an objection to the introduction of the note in evidence because the words "at the rate of eight per cent per annum" appeared upon the face of it to have been erased, which being overruled, error is assigned. The execution of the note was admitted by the answer, defendants not having denied the

fact. Neither was there any controversy relative to the identity of the instrument, nor as to its having been changed or mutilated. The fact, therefore, that an erasure appeared, which did not vary or alter its tenor as set out in extenso in the complaint, could not serve to render it inadmissible in evidence. It was probably not necessary for the plaintiff to have introduced the note, its execution being confessed; but, being desirous of doing so, its admission was not vulnerable to objection on the ground assigned. There was no error, therefore, in the ruling of the court.

The plaintiff having rested with the introduction of the note, the defendants offered evidence tending to establish their first defense, when they were met with the objection that it was not admissible because the answer stated no defense against recovery. This was coupled with another that defendants ought not to be permitted to prove such defenses until they had offered evidence tending to show that plaintiff was not an innocent holder for value and in due course. The objections were sustained, and defendants were not permitted to introduce any testimony whatever, and error is predicated upon the action of the court in that regard. The third separate defense was abandoned at the hearing. This leaves the first and second only to be considered.

2. The attempt of the defendants, it must be admitted, is not a good specimen of technical pleading. The purpose was, no doubt, to confess and avoid. It might be inquired whether they have not confessed too much, so far as it relates to the first separate defense. They have confessed every allegation of the complaint by failure to deny anything. The defendants' denial that they knew that they were signing a promissory note raised no issue, because there was no allegation of that nature in the complaint.

3. But, conceding that defendants could regularly confess all in the manner they have, and yet avoid the action by their affirmative defenses, the very grave question remains whether they have stated facts that will constitute such a defense. The defense sought to be stated is that the note was procured by fraud; that is, that the defendants were induced to believe

through the deceitful and fraudulent statements of Dr. Meyers that they were signing an agreement to pay the money upon a consideration which never came to pass, and not a negotiable instrument, whereas in truth they signed the paper in question, and hence there could be no such a legal condition as a bona fide holder of it. If we concede, as many of the cases seem to hold (a matter we do not now decide), that a promissory note procured by fraud, the maker being misled into believing that he was signing a paper of an entirely different character, is itself a good defense against an indorser claiming to be an innocent purchaser for value, the answer falls short of stating such a defense, for it is essential that the note was so procured without the negligence of the maker. This much is established by the cases cited by appellants: *Green v. Wilkie*, 98 Iowa, 74 (66 N. W. 1046, 36 L. R. A. 434, 60 Am. St. Rep. 184); *Shenandoah Nat. Bank v. Gravatte* (Neb.), 95 N. W. 694; *Keller v. Ruppold*, 115 Wis. 636 (92 N. W. 364, 95 Am. St. Rep. 974); *Frederick v. Clemens*, 60 Mo. 313; *De Camp v. Hamma*, 29 Ohio St. 467.

In *Shirts v. Overjohn*, 60 Mo. 305, it was held that "Where it appeared that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing the same, but by his failure to inform himself of its contents, or by relying upon the representations of another as to the contents of the instrument presented for his signature, signed and delivered a negotiable note in lieu of the instrument intended to be signed, he cannot be heard to impeach its validity in the hands of a bona fide holder." This case bears a marked analogy to the one at bar, and seems to state the consensus of judicial opinion upon the subject; the learned author of the note to *Green v. Wilkie* (36 L. R. A. 434), saying: "Most of the cases, however, hold that if a person who can read trusts to the representations of, or reading of the paper by, a stranger, he will be guilty of negligence which will preclude his making the defense." See, also, upon this subject, *Mackey v. Peterson*, 29 Minn. 298 (13 N. W. 132, 43 Am. Rep. 211); *Ort v. Fowler*, 31 Kan. 478

(2 Pac. 580, 47 Am. Rep. 501); *Keller v. Schmidt*, 104 Wis. 596 (80 N. W. 935). The defendants have wholly failed to negative negligence on their part. The answer shows that Dr. Meyers conversed in their own language, was well dressed, and appeared to be a man of education and fair dealing, and therefore that they reposed confidence in him, and took for granted what he read to them to be a true rendition of the instrument they were about to sign. It does not appear, however, but that they could read English, and could readily have informed themselves then and there of the real contents of the paper; and, having not done so, they were negligent, and the defense of fraud cannot, therefore, avail them as against an innocent holder: *Fisher v. Von Behren*, 70 Ind. 19 (36 Am. Rep. 162).

4. The want of an allegation of the character indicated negating negligence on the part of defendants was such an omission as was not cured by pleading over: *Booth v. Moody*, 30 Or. 222 (46 Pac. 884). The trial court's refusal to admit the evidence under this answer was therefore not error.

5. The second defense of the failure of consideration could not, under any of the authorities, have been availed of as against an innocent purchaser.,

6. Coupled with it is a denial that the plaintiff is an innocent purchaser for value. This is an attempt to deny what they have admitted to be true by failure to traverse the allegation of the complaint that the payee "thereafter and before maturity duly indorsed, assigned, and delivered said promissory note to the plaintiff herein for value." The matter was not in avoidance, but an attempt to deny by the separate defense when the fact was admitted by a failure to traverse in the regular way. This raised no issue, because the fact intended to be controverted had already been admitted by the very plainest rule of pleading under the Code. It seems to be further insisted that, when any fraud or illegality is proven in connection with the utterance of a paper sufficient to render it futile between the parties, the proof of that fact is sufficient to shift the burden of proof to the holder to show that he is an innocent purchaser for value in due course. We have said: "If it be shown on the part of the maker that the note was made under duress, or that

it had its inception in fraud, or if such facts be shown as will raise a strong suspicion of fraud, a further burden will thereby be cast upon the indorsee to show under what circumstances and for what value he became the holder; that is to say, he must then show that he acquired the paper bona fide, for value, in the usual course of business, before maturity, and under such circumstances as to create no presumption that he had knowledge of the facts which tend to impeach its validity": *Owens v. Snell*, 29 Or. 483 (44 Pac. 827). See, also, *Kenny v. Walker*, 29 Or. 41 (44 Pac. 501). The negotiable instruments act, adopted in 1899, prior to the execution of the note in question, would seem by its reading to require the purchaser to show affirmatively, among other things, that he had no notice of such or any other infirmities in the instrument at the time he acquired it: B. & C. Comp. §§ 4446-4456 (Laws 1899, pp. 24-26, §§ 44-54).

These matters, however, cannot help the defendants, for they have absolutely not denied ownership, or that it was indorsed for value before maturity, and have failed to make any issue or question whether the plaintiff's purchase was with notice of the infirmities suggested. The complaint surely states a good cause of action, and, unless controverted, it stands as a prima facie case. In other words, the plaintiff, by no competent pleading on the part of the defendants, has been put to his additional proofs of having paid value in due course, before maturity, and without notice of the infirmities. The fraud latterly spoken of must be distinguished from that which counsel claims for such as was attempted to be set up in the first separate answer; the purpose of the former being to show a state of facts that would exclude the possibility, in a legal sense, of an innocent holder of the paper, but all that is claimed for the fraud in the latter sense is that proof of it puts the plaintiff to the burden of showing good faith in his purchase and the want of notice of its infirmity. We say, as to this latter, the defendants' pleadings do not present the issue they are insisting upon.

7. In this connection it is further claimed that the note on its face destroys its negotiability. The fact of its negotiability is,

however, conceded by admitting the execution of the note in form as set out in the complaint.

8. Effort was made to introduce certain letters referred to in the record for the purpose of showing that the plaintiff was not the owner of the note in question. Here again plaintiff's ownership is admitted by failure to deny the allegation that he acquired the same by indorsement and transfer to him by the payee.

9. Another error is assigned because the court refused leave to amend the answer by adding an allegation that plaintiff had notice of the defects set out in the first and second defenses. "This was a matter within the legal discretion of the trial court. The answer had twice been amended, and it is not clear that the amendment requested would have helped the defendants; so that we cannot say that there was error in that particular.

From these conclusions it is plain that the court very properly directed a verdict for the plaintiff, and the judgment appealed from will therefore be affirmed. **AFFIRMED.**

Argued 25 January, decided 27 March, 1905.

ALLISON v. HATTON.

80 Pac. 101.

EFFECT OF RE-ENACTING STATUTE—AMENDMENT BY IMPLICATION.

1. Parts of statutes that are copied into amended statutes are usually read as parts of the original statute, when considered in connection with an intermediate conflicting statute, and only the new parts of the amended law are considered as enacted at that time.

EFFECT OF STATUTES CHANGING BOUNDARIES OF COUNTIES.

2. Hill's Ann. Laws 1887, § 2251, established the boundaries of C. county, and by Laws 1898, p. 27, an independent act, defining the boundaries of W. county, was amended, detaching a strip of territory from the southwest corner of C. county, and attaching it to W. county, and providing for recording in the latter county certified copies of C. county records affecting real estate so transferred. By Laws 1901, p. 126, Section 2251 was amended so as to change the boundaries of C. county, and include therein at the southeast corner a small section of territory theretofore not included in any county, the amendment being effected merely by a restatement or republication of such section as it existed prior to the act of 1898, only altered to include the additional territory. Held, that such amendment did not repeal Laws 1898, p. 27, so as to return to C. county the strip thereby attached to W. county.

TITLE OF ACT—STATUTES.

3. It is not necessary to insert in the title of an act defining the boundaries of a particular county the name of every other county adjoining at the points of change, or surrounding it, if the act establishes a new county. For instance, Laws 1893, p. 161, entitled "An act to more definitely establish the boundaries of W. county," was not void for failure of such title to contain a reference to C. county adjoining, whose boundaries were affected by the act.

ACTION TO DETERMINE SITUS OF LAND FOR TAXATION.

4. A suit by citizens and taxpayers to restrain the sale of land for taxes assessed against it is a proper remedy to determine in which of two counties plaintiffs' lands were subject to assessment.

From Columbia: THOMAS A. McBRIDE, Judge.

This is a suit by Thomas Allison and others against R. S. Hatton, as Sheriff of Columbia County, for an injunction. Plaintiffs appeal from a decree of dismissal. **AFFIRMED.**

For appellants there was a brief and an oral argument by *Mr. Samuel Bruce Huston*.

For respondent there was a brief over the name of *Dillard & Day*, with an oral argument by *Mr. Joseph Warren Day*.

MR. JUSTICE BEAN delivered the opinion of the court.

In 1885 the legislature passed an act to define and establish the boundaries of Columbia County (Laws 1885, p. 324), which became Section 2251 of Hill's Ann. Laws 1887. In 1898, by an act to amend an independent act of 1895, to establish more definitely the boundaries of Washington County, a strip of territory one mile wide and eleven miles long was taken from the southwest corner of Columbia County and attached to Washington County, provision being made in the law for recording in the latter county certified copies of the records of Columbia County affecting real estate situated in such territory: Laws 1898, p. 27. In 1901 the legislature, by an act entitled "An Act to Amend Section 2251 of Title 2, Chapter 4, of the Miscellaneous Laws of Oregon, as compiled and annotated by W. Lair Hill" (Gen. Laws 1901, p. 126), changed the boundaries of Columbia County so as to include therein at the southeast corner a small section of territory theretofore not in any county. The amendatory act of 1901 declared that Section 2251 "is hereby amended so as to read as follows," and then sets out the section in full as originally enacted, with the change in the boundary at the southeast corner necessary to include the strip of land to be taken into the county. No reference is made to the act of 1898 defining the boundaries of Washington County, and no provision made for recording in Columbia County certified copies of the records of Washington County affecting the title to lands in the disputed territory. After the passage of the

amendatory act of 1901, both Columbia and Washington counties claimed jurisdiction over the eleven sections of land taken from Columbia and attached to Washington by the act of 1898. This suit is brought by the citizens and taxpayers in such disputed territory to enjoin and restrain the sale of the land for taxes assessed against it in Columbia County, on the ground that it is within the jurisdiction of Washington and not Columbia County. The complaint was dismissed, and plaintiffs appeal.

1. The position of the defendants is that the amendatory act of 1901, defining the boundaries of Columbia County, being a later legislative declaration on the subject, operated to repeal by implication the act of 1898, defining the boundaries of Washington County, so far as the two are in conflict, and restored to Columbia County the disputed territory. The act of 1901, amending Section 2251, so far as the question here involved is concerned, is not a new legislative declaration on the subject of the boundaries of the county, but merely a restatement or republication of the law as it existed prior to the act of 1898, and is therefore not in conflict with the latter act, and does not repeal it by implication. The rule is that where a section of the statute is amended so as to read "as follows," and the section is then set forth with the changes intended to be made, those portions of the old section that are merely copied into the amendment without change are not to be considered as re-enacted or as a new statement of the law, but are to be read as a part of the earlier statute, if in conflict with another law passed after the section amended and before the amendatory act, unless there is a clear manifestation of legislative intention to the contrary. In the absence of such an intention, it is the change or additions incorporated in the section amended only that are to be considered enacted. This doctrine has been several times applied by this court, and is supported by the authorities: *Endlich*, Interp. Stat. § 194; *Stingle v. Nevel*, 9 Or. 62; *Eddy v. Kincaid*, 28 Or. 537 (41 Pac. 156, 655); *Small v. Lutz*, 41 Or. 570 (67 Pac. 421, 69 Pac. 825).

2. An examination of the amendatory act of 1901 shows that its purpose was to change the boundary of Columbia County at

the southeast corner thereof, so as to include a section of territory between that county and Multnomah which, as is asserted by counsel, was not at the time within any organized county of the State, and no intention is manifest to relocate or re-establish the boundary line between Washington and Columbia counties. No reference is made in the title or in the body of the act to Washington County, and no provision is made for recording in Columbia County copies of the records of Washington County affecting the title to land within the disputed territory, as would naturally have been the case had it been intended to make a change in the boundary of the two counties.

3. A contention is made by the defendants that the act of 1893, of which the act of 1898 is an amendment, is void, because the subject-matter thereof is not sufficiently indicated by the title. It is entitled "An Act to More Definitely Establish the Boundaries of Washington County" (Laws 1893, p. 161), and the argument is that it is insufficient because Columbia County is not mentioned therein, but we think the title is within the requirements of the constitution. It was an independent act, and the subject-matter thereof was indicated by its title. It was to define the boundaries of Washington County, and necessarily indicated a purpose to affect the boundaries of all adjoining counties. It was not necessary for the title to state the names of the counties to be affected. The title is in harmony with the practice which seems to have prevailed in this State from its organization in the matter of changing or altering the boundaries of counties and of creating new counties. If the act is void for the reason stated, the original act creating Columbia County, and that creating Multnomah County, are vitiated, and both of those counties are now a part of Washington County.

4. It is objected that there is a misjoinder of parties plaintiffs and defendants, and that plaintiffs have mistaken their remedy; but there is ample authority for the proceeding adopted in this case to test the question as to whether the lands of plaintiffs are liable to assessment and taxation in Washington or Columbia County: 1 High, Injunctions (3 ed.), §§ 540, 574, 576 and 577; 2 Cooley, Taxation (3 ed.), 1429; *Union Pacific Ry. Co. v. Carr*, 1 Wyo. 96; *Hays v. Hill*, 17 Kan. 360.

The decree of the court below will be reversed, and one entered here as prayed for in the complaint. **REVERSED.**

MR. JUSTICE MOORE took no part in this decision.

Argued 23 February, decided 17 April, rehearing denied 3 July, 1905.

NEPPACH v. OREGON & CAL. RAILROAD CO.

80 Pac. 432.

APPEAL—CONCLUSIVENESS OF VERDICT AS TO FACTS.

1. On appeal the supreme court cannot review questions of fact, but must accept the verdict as conclusive if it is supported by any competent evidence.

EVIDENCE AS TO DISPUTED FACTS.

2. The evidence in this case supports the verdict.

AUTHORITY OF AGENT—QUESTIONS OF LAW AND FACT.

3. The appointment or authority of an agent is a question of fact, but what he may do by virtue thereof is a question of law. When the appointment and authority are admitted the court may declare whether they empower the agent to perform the particular act in question, but when there is a dispute as to the appointment or authority conferred, the fact of such appointment or authority must be found by the trier of fact.

EVIDENCE AS TO SCOPE OF AGENCY.

4. One who is held out by a railroad company as its authorized land agent, and who transacts its entire business in relation to the acquisition, sale and disposition of lands, may bind the company by a contract extending the time for payment by a purchaser of lands, or waiving a strict compliance with the provisions of the contract in that regard.

VENDOR AND PURCHASER—ORAL MODIFICATION OF WRITTEN CONTRACT*—STATUTE OF FRAUDS—ESTOPPEL.

5. A party to a written contract for the sale of land, who knowingly gives an oral consent to a postponement of the performance of some material provision that is of benefit to the one consenting, will not be permitted to insist, after the other party has acted on the consent, that such consent is void because not written, and enforce the contract as originally made, even though time and the prompt performance of the deferred condition were made essential: *Whiteaker v. Vanschoiack*, 5 Or. 113, and *Sayre v. Mohney*, 35 Or. 141, distinguished. The statute of frauds was not intended to aid in the perpetration of injustice or dishonesty.

DAMAGES FOR FAILURE TO CONVEY LAND—ELEMENTS OF VALUE.

6. While the value of real estate cannot be shown by proving the value of the several constituent elements of value and then adding those together, yet a witness who has given his opinion as to the market value of the land may state the facts upon which his opinion is based, although they involve the character and value of a constituent element of the realty, such as timber.

MEASURE OF DAMAGES FOR FAILURE OF VENDOR TO CONVEY.†

7. The vendee's damage for the vendor's refusal to convey is the value of the land agreed to be conveyed at the time of such refusal, less the unpaid purchase price.

From Multnomah: ARTHUR L. FRAZER, Judge.

Statement by MR. JUSTICE BEAN.

*See note in 56 Am. St. Rep. at p. 671.

†NOTE.—See 4 L. R. A. 670 for collection of authorities on measure of damages on breach of contract to convey.

This is an action by Anthony Neppach against the Oregon & California Railroad Co. On March 24, 1883, the defendant contracted to sell to the plaintiff and one C. A. Himpel (the contract being in the name of Himpel) five sections of land in the eastern part of Multnomah County and within the indemnity limits of the grant made to it by act of congress of July 25, 1866. The contract price was \$12,866.36, of which \$1,286.69 was paid in cash, and the balance, with interest, was to be paid in ten annual installments, the last becoming due March 24, 1893. The times of payments were made of the essence of the contract, and it was stipulated and agreed that, in case of default, the contract, so far as it might bind the defendant, should become absolutely null and void. The land was included also within the limits of a prior grant of congress to the Northern Pacific Railroad Co., and soon after the making of the contract a controversy arose as to whether it belonged to that company or the defendant. It is claimed and alleged that, owing to this controversy, and to the uncertainty of the defendant's title, a parol agreement was made and entered into between plaintiff and Himpel and Schulze, the land agent of the defendant, a short time before the second payment became due, that the time for making the deferred payments should be postponed until the settlement of such controversy, and, in case it should be decided in favor of defendant, plaintiff and Himpel should make the deferred payments and receive title to the land, but, in case it should be decided against defendant, they should make no claim for damages, but should be entitled to a return of the money already paid; that on March 24, 1884, when the second payment became due, it was tendered to defendant, but was declined, and plaintiff and Himpel were informed that no more payments would be accepted or received until the overlap controversy was settled; and that, relying upon such statement and the extension agreement referred to, they made no tender or offer to perform prior to the settlement of such controversy, except in March, 1885, when they inquired of defendant's agent if the controversy had been determined, and if defendant was ready to accept further payments, offering to make the same, but were informed that defendant was not yet ready to comply with its contract, and would not receive any

payments until the overlap controversy was determined. This controversy was pending in various forms in the United States land offices and the courts until January, 1900, when it was finally settled in favor of the defendant by the Supreme Court of the United States: *United States v. Oregon & Cal. R. Co.*, 176 U. S. 28 (20 Sup. Ct. 261, 44 L. Ed. 358). The plaintiff, to whom the contract for the sale of the land had in the mean time been assigned, thereupon tendered defendant the balance due, and demanded a conveyance, but it refused to accept the money or to comply with the contract on the ground that all rights of the plaintiff had been forfeited for failure to make the payments as stipulated. This action was afterwards commenced to recover damages for a breach of the contract. Plaintiff had judgment for \$47,000, and the defendant appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. William David Fenton* and *Mr. William Coleman Bristol*, with a brief by *Mr. Fenton* to this effect.

I. Plaintiff relies upon a parol agreement modifying the original contract of March 24, 1883, claimed by him to have been made on behalf of the defendant by and through Paul Schulze, and to have been so made by Schulze with Himpel and plaintiff. The only basis for such a claim is an alleged conversation between Schulze, Himpel and plaintiff which took place in July or August, 1883, some four months after the contract was made and long prior to March 24, 1884, the date when the second payment matured. The evidence does not show a valid or any agreement. The conversation detailed, if true, does not amount to a contract, and was not intended by any of the parties as a contract, and was wholly without consideration: *Clark, Contracts*, p. 172; *Lipsmeier v. Vehslage*, 29 Fed. 175; *Holmes v. Boyd*, 90 Ind. 332; *Sluber v. Schack*, 83 Ill. 191; *Hoffman v. Coombs*, 9 Gill, 284; *Ives v. Bosley*, 35 Md. 262 (6 Am. Rep. 411); *Turnbull v. Brock*, 31 Ohio St. 649; *Holliday v. Poole*, 77 Ga. 159; *Liening v. Gould*, 13 Cal. 598; *Barron v. Vandvert*, 13 Ala. 232.

II. A new agreement altering the terms of a prior written contract within the statute of frauds, or discharging or waiving it in part only, is also within the statute, and in order to be binding must be in writing, and this rule, according to the great weight of authority, applies to an extension of time in which a contract required to be in writing is to be performed, excepting where the modified agreement has been fully performed. If the conversations detailed by Neppach and Himpel show a contract, such contract embraced in its terms other material elements than the mere extension of time: *Carpenter v. Galloway*, 73 Ind. 418, 423; *Bradley v. Harter*, 156 Ind. 499 (60 N. E. 139); *Walter v. Victor Bloede Co.* 94 Md. 80 (50 Atl. 433); *Abell v. Munson*, 18 Mich. 306 (100 Am. Dec. 165); *Cook v. Bell*, 18 Mich. 387; *Weaver v. Aitcheson*, 65 Mich. 285-287 (32 N. W. 436) *Long v. Hartwell*, 34 N. J. Law, 116; *Espy v. Anderson*, 14 Pa. 308; *Ladd v. King*, 1 R. I. 224 (51 Am. Dec. 624); *Hicks v. Aylsworth*, 13 R. I. 562; *Dana v. Hancock*, 30 Vt. 616; *Hetch v. Woolridge*, 6 Randolph (Va.), 605 (18 Am. Dec. 751); *Rucker v. Harrington*, 52 Mo. App. 481; *Newman v. Bank*, 70 Mo. App. 135; *Warren v. A. B. Mayer Mfg. Co.*, 161 Mo. 112 (61 S. W. 644); *Schultz v. Bradley*, 57 N. Y. 646; *Hill v. Blake*, 97 N. Y. 216; *Thomson v. Poor*, 10 N. Y. Supp. 597, 598, 22 N. Y. Supp. 570; *Lee v. Hawks*, 68 Miss. 669 (13 L. R. A. 633, 9 So. 828); *Brown v. Sanborn*, 21 Minn. 402; *Heisley v. Swannstrom*, 40 Minn. 196-200 (41 N. W. 1029); *Burns v. Fidelity Real Estate Co.*, 52 Minn. 31-34 (53 N. W. 1017); *Clark v. Guest*, 54 Ohio St. 298 (43 N. E. 862); *Wigginton v. Ewell* (Ky.), 9 S. W. 285; *Wilson's Assignee v. Beam* (Ky.), 14 S. W. 362; *Marsh v. Bellew*, 45 Wis. 36-52; *Atlee v. Bartholomew*, 69 Wis. 43, 51 (33 N. W. 110); *Whiteaker v. Vanschoiack*, 5 Or. 115-118; *Keller v. Bley*, 15 Or. 429-433 (15 Pac. 705); *Sayre v. Mohney*, 35 Or. 141 (56 Pac. 526); *Harris v. Murphy*, 119 N. C. 34 (56 Am. St. Rep. 656); *Augusta Southern R. Co. v. Railway Co.*, 106 Ga. 864 (33 S. E. 28); *Slingluff v. Andrew Volk B. S. Co.*, 89 Md. 557 (43 Atl. 759); *Foster v. Furlong*, 8 N. D. 282; 78 N. W. 986; *Jones v. Alley*, 4 Greene (Iowa), 181; *Platt v. Butcher*, 112 Cal. 634 (44 Pac. 1060); *Reid v. Diamond Plate Glass Co.*, 29 C. C. A. 110 (85 Fed. 193); 1 Chitty, Con-

tracts (11 ed.), 125; Clark, Contracts, p. 93; Browne, Stat. Frauds (3 ed.), §§ 411-417; 2 Reed, Stat. Frauds, §§ 454-459; 2 Rice, Evidence, § 516; *Hasbrouck v. Tappen*, 15 Johnson, 200; *Goss v. Ld. Nugent*, 5 B. & Ad. 58; *Harvey v. Graham*, 5 Ad. & El. 61; *Blood v. Goodrich*, 6 Wend. 67; *Williamson v. Paxton*, 18 Grat. 475; *Bryan v. Hunt*, 5 Sneed, 543; *Stead v. Dawber*, 10 Ad. & El. 57; *Emerson v. Slater*, 22 How. 28-42; *Swain v. Seaman*, 76 U. S. (9 Wall.) 254.

III. The general rule is that an agent employed to do an act is deemed authorized to do it in the manner in which the business intrusted to him is usually done, and such is the presumed limitation upon his power to act for his principal. An agent having authority to sell has power to do only that which is usual in the course of the business, and in the usual and ordinary way. The parol contract claimed to have been made with Schulze was not within the scope of his apparent authority, and was not an act in the usual and ordinary course of business of his agency. It was an extraordinary and unusual act: 2 Morawetz, Corp. §§ 587-616; 2 Greenleaf, Evidence (15 ed.), 64a; Mechem, Agency, §§ 276-312, 399-408; Hufcut, Agency, §§ 7, 103-107; Story, Agency (9 ed.), § 170; 1 Am. & Eng. Enc. Law (2 ed.), 986-1029; *Luse v. Isthmus Trans. Ry. Co.* 6 Or. 125 (25 Am. Rep. 506); *Glenn v. Savage*, 14 Or. 567, 577 (13 Pac. 442); *Brown v. Farmers' Supply Co.* 23 Or. 541-544 (32 Pac. 548); *Durkee v. Carr*, 38 Or. 189; *Hoffman v. Insurance Co.* 92 U. S. 161; *Western Nat. Bk. v. Armstrong*, 152 U. S. 351 (14 Sup. Ct. 572); *National Bank Repub. v. Old Town Bank*, 112 Fed. 726; *Lockhart v. Wyatt*, 10 Ala. 231 (44 Am. Dec. 481); *Jones v. Warner*, 11 Conn. 40-48; *Luke v. Griggs*, 4 Dak. 287; *Lawrence v. Johnson*, 64 Ill. 351; *Gerrish v. Maher*, 70 Ill. 470; *Company v. Elliott*, 76 Ill. 67; *Company v. McCormic*, 40 Ill. App. 51; *Hess v. Company*, 54 Ill. App. 227; *Kinzer v. Company*, 64 Ill. App. 437; *Chappel v. Raymond*, 20 La. Ann. 277; *Upton v. Suffolk County Mills*, 11 Cūsh. 586; *Cooley v. Perine*, 41 N. J. Law, 322 (32 Am. Rep. 210); *Hutchings v. Munger*, 41 N. Y. 155, 158; *Smith v. Kidd*, 68 N. Y. 130-140 (23 Am. Rep. 157); *Stillwell v. Insurance Co.* 72 N. Y. 385-391; *Ritch v. Smith*, 82 N. Y. 627-629;

Argersinger v. Macnaughton, 114 N. Y. 535 (11 Am. St. Rep. 687, 21 N. E. 1022); *Mayer v. Dean*, 115 N. Y. 556, 561 (5 L. R. A. 540, 22 N. E. 261); *Edwards v. Dooley*, 120 N. Y. 552 (24 N. E. 827); *Sullivan v. Insurance Co.* 15 Mont. 534 (39 Pac. 745); *Bohanan v. Boston & M. Ry. Co.* 70 N. H. 526 (49 Atl. 103); *Rankin v. New England M. Co.* 4 Nev. 78-85; *Franklin v. Ezell*, 33 Tenn. (1 Sneed), 497-499; *Strong v. Stewart*, 56 Tenn. (9 Heisk.) 137-147; *Adrian v. Lane*, 13 S. C. 183; *Jesup v. Bank of Racine*, 14 Wis. 359; *Mallory v. Mariner*, 15 Wis. 172; *McAlpin v. Cassidy*, 17 Tex. 450-462; *Franco-Texan L. Co. v. McCormick*, 85 Tex. 416 (34 Am. St. Rep. 815); *Genter v. Conglomerate Min. Co.* 23 Utah, 165 (64 Pac. 363); *Williams v. Getty*, 31 Pa. St. 461 (72 Am. Dec. 757).

IV. An unauthorized sale of land cannot be ratified except in writing, or by such conduct as would constitute an estoppel, and such ratification must be made by a party informed of the facts. There can be no estoppel unless a party is misled to his prejudice by the one against whom it is set up and does material acts relying upon conduct well calculated to mislead him. It is not claimed that the pretended contract of extension, if any such was made, was known to the defendant or ratified by it in any way. On the contrary, it is claimed that it was distinctly repudiated by Andrews and the company when it first came to their knowledge: *Pollard v. Gibbs*, 55 Ga. 45; *Newton v. Bronson*, 13 N. Y. 587 (67 Am. Dec. 89); *Haydock v. Stow*, 40 N. Y. 363; *Palmer v. Williams*, 24 Mich. 329; *Hawkins v. McGroarty*, 110 Mo. 546 (19 S. W. 830); Reed, Stat. Frauds, Vol. 1, § 382.

(a) If Schulze was not authorized in writing to make the modified or original contract, ratification thereof must be made in writing and after full knowledge of all the facts. Accepting benefits arising from a contract made by an unauthorized agent is a ratification only of such contract as can be ratified by parol: *Salfield v. Sutter County Recl. Co.* 94 Cal. 546 (29 Pac. 1105); *Borderre v. Den*, 106 Cal. 594 (39 Pac. 946); *Blood v. La Serena Co.* 113 Cal. 221 (41 Pac. 1017, 45 Pac. 252); *Goetz v. Goldbaum* (Cal.), 37 Pac. 646; *Maus v. Worthing*, 3 Scam. 26; *Bragg*

v. *Fessenden*, 11 Ill. 544; *Ingraham v. Edwards*, 64 Ill. 527; *Kopp v. Reiter*, 146 Ill. 437 (37 Am. St. Rep. 156, 34 N. E. 942); *Ragan v. Chenault*, 78 Ky. 545; *Paine v. Tucker*, 21 Me. 138 (38 Am. Dec. 255); *Heath v. Nutter*, 50 Me. 378; *Despatch Line v. Bellamy*, 12 N. H. 205 (37 Am. Dec. 203); *Blood v. Goodrich*, 9 Wend. 55-67; *McDowell v. Simpson*, 3 Watts, 129 (27 Am. Dec. 338); *Story, Agency*, § 242; 1 Am. & Eng. Enc. Law (2 ed.), 1211.

(b) Estoppel en pais cannot be shown so as to make valid an unauthorized sale by an agent whose authority is required by law to be in writing: *Marshall v. Williams*, 21 Or. 268-276 (28 Pac. 137); *Kelley v. Hendricks*, 57 Ala. 193; *Videau v. Griffin*, 21 Cal. 390; *Platt v. Butcher*, 112 Cal. 634 (44 Pac. 1060); *Tibble v. Anderson*, 63 Ga. 41; *Koch v. National Bldg. Assoc.* 137 Ill. 497-503 (27 N. E. 530); *Durkee v. People ex rel.* 155 Ill. 354-362 (46 Am. St. Rep. 340, 40 N. E. 626); *Langan v. Sankey*, 55 Iowa, 52-54 (7 N. W. 393); *Wigginton v. Ewell* (Ky.), 9 S. W. 285; *Brightman v. Hicks*, 108 Mass. 246; *Blood v. Hardy*, 15 Me. 61; *Wright v. Degraff*, 14 Mich. 364; *Hayes v. Livingstone*, 34 Mich. 384. (22 Am. Rep. 533); *Wardell v. Williams*, 62 Mich. 50 (4 Am. St. Rep. 814, 28 N. W. 796); *Huyck v. Bailey*, 100 Mich. 223-226 (58 N. W. 1002); *Bell v. Goodnature*, 50 Minn. 417 (52 N. W. 908); *Hawkins v. McGroarty*, 110 Mo. 546 (19 S. W. 830); *Smith v. Smith*, 62 Mo. App. 596; *Neldon v. Smith*, 36 N. J. Law, 148-157; *Trenton Bk. Co. v. Duncan*, 86 N. Y. 221; *Hermann, Estoppel*, p. 111; 2 Pomeroy, *Equity*, § 805, note 1, and § 807; 2 Reed, *Stat. Frauds*, § 733.

V. Where the facts are undisputed, or the facts and all inferences therefrom are conceded, the court must determine as matter of law whether such facts authorize the act of the agent so as to bind the principal: *Connell v. McLoughlin*, 28 Or. 230, 232 (42 Pac. 218); *Long Creek B. & L. Assoc. v. State Ins. Co.* 29 Or. 569, 576 (46 Pac. 366); *Franklin Note Co. v. Nackey*, 83 Hun, 511; *Mechem, Agency*, § 105.

VI. Where a vendor makes a contract to sell and convey in good faith, believing himself to be the owner of property, and is afterwards incapable of performing by reason of a defect in

his title, of which he was not aware, or of which both parties had full knowledge, if nothing is paid by the vendee the damages are merely nominal. In such case the vendee can only recover payments made with interest and expenses incurred in the investigation of the title: 2 Warvelle, Vendors (2 ed.), 1114; 3 Sedgwick, Damages (8 ed.), §§ 1101-1110; *Flureau v. Thornhill*, 2 Wm. Bl. 1078; *Worthington v. Warrington*, 8 C. B. 134; *Bain v. Fothergill*, L. R., 6 Ex., 59 (L. R., 7 H. L., 158); *Buckley v. Dawson*, 4 I. R. C. L. 211; *Arthur v. Moss*, 1 Or. 193; *Adair v. Adair*, 22 Or. 115-133 (29 Pac. 193); *Snodgrass v. Reynolds*, 79 Ala. 452 (58 Am. Rep. 601); *Yates v. James*, 89 Cal. 474 (26 Pac. 1073); *Allen v. Anderson*, 2 Ky. (2 Bibb) 415 (5 Am. Dec. 619); *Davis v. Lewis*, 5 Ky. (4 Bibb) 456; *Goff v. Hawks*, 28 Ky. (5 J. J. Marsh) 341; *Sanford v. Cloud*, 17 Fla. 532; *Stewart v. Noble*, 1 Greene (Iowa), 26; *Foley v. McKeegan*, 4 Iowa, 1 (66 Am. Dec. 107); *Sweem v. Steele*, 5 Iowa, 352, 10 Iowa, 374; *Beard v. Delaney*, 35 Iowa, 16; *Sawyer v. Warner*, 36 Iowa, 333; *Yokom v. McBride*, 56 Iowa, 139 (8 N. W. 795); *Donner v. Redenbaugh*, 61 Iowa, 269 (16 N. W. 127); *Tracy v. Gunn*, 29 Kan. 508; *Baltimore P. B. L. Soc. v. Smith*, 54 Md. 187; *Dunnice v. Sharp*, 7 Mo. 71; *Baldwin v. Munn*, 2 Wend. 399 (20 Am. Dec. 627); *Peters v. McKeon*, 4 Denio, 546; *Conger v. Weaver*, 20 N. Y. 140; *Pumpelly v. Phelps*, 40 N. Y. 59 (100 Am. Dec. 463); *Leggett v. Mutual Life Ins. Co.* 53 N. Y. 394; *Margraf v. Muir*, 57 N. Y. 155; *Cockroft v. Railway Co.* 69 N. Y. 201; *Northridge v. Moore*, 118 N. Y. 419 (23 N. E. 570); *Walton v. Meeks*, 120 N. Y. 79 (23 N. E. 1115); *Drake v. Baker*, 34 N. J. Law, 358; *Gebbert v. Congregation*, 59 N. J. Law, 160 (35 Atl. 1121, 5 Am. St. Rep. 578); *Erickson v. Bennett*, 39 Minn. 326 (40 N. W. 157); *Lancoure v. Dupre*, 53 Minn. 301 (55 N. W. 129); *Bitner v. Brough*, 11 Pa. St. 127; *McDowell v. Oyer*, 21 Pa. St. 417; *McClowry v. Croghan*, 31 Pa. St. 22; *Hertzog v. Hertzog*, 34 Pa. St. 418; *McNair v. Compton*, 35 Pa. St. 23; *Burk v. Serrill*, 80 Pa. St. 413 (21 Am. Rep. 105); *McCafferty v. Griswold*, 99 Pa. St. 270; *Allison v. Montgomery*, 107 Pa. St. 455; *Hall v. York*, 22 Tex. 641; *Wheeler v. Styles*, 28 Tex. 240; *Johnson v. Hamilton*, 36 Tex. 270; *Thompson v. Guthrie*, 9 Leigh, 101; *Saulters*

v. *Victory*, 35 Vt. 351; *Morgan v. Bell*, 3 Wash. St. 554 (16 L. R. A. 614, 28 Pac. 925); *Hall v. Delaplaine*, 5 Wis. 206 (68 Am. Dec. 57); *Combs v. Scott*, 76 Wis. 662-670 (45 N. W. 532).

VII. It was incompetent to prove the value of these lands by proof of the stumpage of the timber growing thereon and of the value of such stumpage. Such measure of damage is speculative and misleading, and introduces into the case where the value of the land is to be ascertained uncertain elements depending on conditions that have not happened, and upon contingencies that cannot be legally measured. The verdict returned in this case is clearly excessive, and could not have been reached, excepting upon some such basis of stumpage value permitted to be shown. All the authorities exclude such testimony: *Rogers, Exp. Test.* (2 ed.), p. 376; *Kansas, etc., Ry. Co. v. Vickroy*, 46 Kan. 248 (26 Pac. 698); *Railway Co. v. Winslow*, 66 Ill. 219-222; *Manning v. Lowell*, 173 Mass. 100-103 (53 N. E. 160); *Gardner v. Brookline*, 127 Mass. 358-361; *Page v. Wells*, 37 Mich. 415-420; *Powers v. Railway Co.* 33 Ohio St. 429-434; *Searle v. Railway Co.* 33 Pa. St. 57-64; *Pennsylvania S. V. R. Co. v. Cleary*, 125 Pa. St. 442-451 (11 Am. St. Rep. 913, 17 Atl. 468).

VIII. This contract, if valid, made on March 24, 1883, and if payment was not extended, was one under the terms of which defendant could and did forfeit the money paid, and it thereby terminated the rights of the vendee therein: *Clarno v. Grayson*, 30 Or. 111-120 (46 Pac. 426); *Sayre v. Mohney*, 30 Or. 238 (47 Pac. 197); *Holbrook v. Investment Co.* 30 Or. 259 (47 Pac. 920); *Pease v. Barter*, 12 Wash. 567 (41 Pac. 899).

(a) And even if Schulze or Moores or Andrews refused on behalf of defendant to accept the payment of March 23, 1884, and if all that Neppach and Himpel claim is true, the notice given them by Andrews, April 5, 1885, of the intention of defendant to cancel the contract for failure to pay the two preceding installments then due, was a revocation of any act or word of Schulze or Moores, and justified the cancellation of May 22, 1885, and plaintiff and Himpel acquiesced in such cancellation.

For respondent there was an oral argument by *Mr. Ossian Franklin Paxton* and *William Thomas Burney*, with a brief over

the name of *Paxton, Beach & Simon* and *Mr. Burney*, to this effect.

1. Appellant was bound by the written contract of sale: 2 *Cook, Corp.* (4 ed.), § 713; 4 *Thompson, Corp.* § 5289; *Mechem, Agency*, §§ 84, 279; *Calvert v. Idaho Stage Co.* 25 Or. 412 (36 Pac. 24); *United States Bank v. Dandridge*, 25 U. S. (12 Wheat.) 64-71; *Supervisors v. Shenck*, 72 U. S. 772, 782; *Merchants' Bank v. State Bank*, 77 U. S. 604, 644; *Kirk v. Hamilton*, 102 U. S. 68, 76; *Martin v. Webb*, 110 U. S. 7, 14; *Pittsburg C. & St. L. Ry. Co. v. Keokuk Bridge Co.* 131 U. S. 371, 382 (9 Sup Ct. 770); *Union Mutual, etc., Co. v. White*, 106 Ill. 67, 75; *Johnson v. Hurley*, 115 Mo. 513 (22 S. W. 492); *Gano v. Chicago & N. W. Ry. Co.* 66 Wis. 1 (27 N. W. 628).

2. The oral agreement suspending payments and extending the time of the performance of the contract of sale until the termination of the overlap controversy was valid; and, by making and inducing respondent and Himpel to make and act upon that agreement, appellant waived performance at the time specified in the contract of sale and estopped itself from asserting that respondent did not perform in time: 2 *Reed, Stat. Frauds*, § 462; 1 *Warvelle, Vendors*, 180; *Jones, Evidence*, § 450; 1 *Greenleaf, Evidence*, § 304; 17 *Am. & Eng. Enc. Law* (1 ed.), 449; *Sayre v. Mohnney*, 35 Or. 141, 149 (56 Pac. 526); *Baker v. Whiteside*, 1 Ill. (Breese) 174 (12 Am. Dec. 168); *Wadsworth v. Thompson*, 3 Gilm. (Ill.) 423, 428; *North v. Kiser*, 72 Ill. 172, 175; *Longfellow v. Moore*, 102 Ill. 289, 294; *Robinson v. Batchelder*, 4 N. H. 40; *Cummings v. Arnold*, 44 Mass. (3 Metc.) 486, 489 (37 Am. Dec. 155); *Stearns v. Hall*, 63 Mass. (9 Cush.) 31; *Missouri, K. & T. Ry Co. v. Pratt*, 64 Kan. 118 (67 Pac. 464); *Tingley v. Fairhaven Land Co.* 9 Wash. 34, 39 (36 Pac. 1098); *Whiting v. Doughton*, 31 Wash. 327 (71 Pac. 1026); *Delaney v. Linder*, 22 Neb. 274 (34 N. W. 630); *Izard v. Kimmel*, 26 Neb. 51, 57 (41 N. W. 1068); *Bowman v. Wright*, 65 Neb. 661 (91 N. W. 580, 92 N. W. 580); *Cox v. Carrell*, 6 Iowa, 350, 352; *Reed's Heirs v. Chambers*, 6 Gill & J. 490, 494; *Krebs v. Jones*, 44 Md. 396, 408; *Blood v. Hardy*, 15 Me. 61; *Richardson v. Cooper*, 25 Me. 450, 452; *Ochsenkehl v. Jeffers*, 32 Mich. 481, 483; *Scheerschmidt v. Smith*, 74 Minn. 224, 229

(77 N. W. 34); *Dickson v. Green*, 24 Miss. 612; *Vanhouten v. McCarty*, 4 N. J. Eq. 141, 148; *Long v. Hartwell*, 34 N. J. Law. 116, 125; *Keating v. Price*, 1 John. Cas. 23; *Fleming v. Gilbert*, 3 Johns. 528, 531; *Erwin v. Saunders*, 1 Cow. 249, 250 (13 Am. Dec. 520); *Franchot v. Leach*, 5 Cow. 506, 508; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, 353; *Young v. Hunter*, 6 N. Y. 203, 206; *Friess v. Rider*, 24 N. Y. 367, 369 (82 Am. Dec. 308); *Ryan v. Dox*, 34 N. Y. 307, 318 (90 Am. Dec. 696); *Blanchard v. Trim*, 38 N. Y. 225, 227; *Organ v. Stewart*, 60 N. Y. 413, 419; *Hill v. Blake*, 97 N. Y. 216, 222; *Stark v. Wilson*, 6 Ky. (3 Bibb) 476; *McNish v. Reynolds*, 95 Pa. St. 483, 486; *Wilber v. Paine*, 1 Ohio, 248, 256; *Negley v. Jeffers*, 28 Ohio St. 90, 100; *Lawrence v. Dole*, 11 Vt. 549, 555; *Marsh v. Bellew*, 45 Wis. 36, 52.

3. It was for the jury to determine whether or not the making of the oral agreement extending the time of performance of the contract of sale until the settlement of the overlap controversy was within the real or apparent scope of land agent Schulze's authority. The circuit court was right in submitting that question to the jury: *Huffcut, Agency*, § 103; *Mechem, Agency*, § 287; *Story, Agency* (9 ed.), §§ 84, 85; 1 Am. & Eng. Enc. Law (2 ed.), 996; *Hardwick v. State Ins. Co.* 20 Or. 547, 558 (26 Pac. 840); *Williamson v. North Pac. Lum. Co.* 38 Or. 560 (63 Pac. 16, 64 Pac. 854); *Merchants' Bank v. State Bank*, 77 U. S. 604, 644; *Mining Co. v. Bank*, 104 U. S. 192, 194; *Morgan v. Neal*, 7 Idaho, 629 (65 Pac. 66); *Johnson v. Milwaukee Inv. Co.* 46 Neb. 480 (64 N. W. 1100); *Thompson v. Shelton*, 49 Neb. 644 (68 N. W. 1055); *Holt v. Schneider*, 57 Neb. 523 (57 N. W. 1086); *Reid v. Kellogg*, 8 S. Dak. 596 (67 N. W. 687); *American Iron Works v. Galland Malting Co.* 30 Wash. 178 (70 Pac. 236); *Lovejoy v. Railroad Co.* 128 Mass. 480; *Hodges v. Detroit E. L. & P. Co.* 109 Mich. 547 (67 N. W. 564); *Fishbaugh v. Spurnagle*, 118 Iowa, 337 (92 N. W. 58); *Scott v. Wells*, 6 Watts & S. 357 (40 Am. Dec. 568); *McMorris v. Simpson*, 21 Wend. 609, 613; *Brattie v. Railroad Co.* 90 N. Y. 643; *Pickert v. Marston*, 68 Wis. 465 (60 Am. Rep. 876, 32 N. W. 550); *Roche v. Pennington*, 90 Wis. 110 (62 N. W. 946).

4. Land agent Schulze was the general agent of appellant in relation to its lands and land business, and the making of the oral agreement extending the time of performance of the contract of sale until the settlement of the overlap controversy was within the scope of his authority: *Hughes v. Lansing*, 34 Or. 118, 124 (75 Am. St. Rep. 574, 55 Pac. 95); *United States Bank v. Dandridge*, 25 U. S. (12 Wheat.) 63; *Rolling Mill v. Railroad*, 120 U. S. 256, 259; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533, 549; *Denman v. Bloomer*, 11 Ill. 177, 192; *German Fire Ins. Co. v. Grunert*, 112 Ill. 68, 71; *Pratt v. Railroad Co.* 21 N. Y. 305, 311; *Standard Oil Co. v. Insurance Co.* 64 N. Y. 85, 89; *Isaacson v. New York C. & H. R. Co.* 94 N. Y. 278, 285 (46 Am. Rep. 142); *Credit Co. v. Howe Machine Co.* 54 Conn. 357, 388 (1 Am. St. Rep. 123, 8 Atl. 472); *McCormick H. Mach. Co. v. Russell*, 86 Iowa, 556 (53 N. W. 310); *Fishbaugh v. Spunaugle*, 118 Iowa, 337 (92 N. W. 58); *White Lake Lum. Co. v. Stone*, 19 Neb. 402 (27 N. W. 95); *Huntley v. Mathias*, 90 N. C. 101 (47 Am. Rep. 516); *Palmer v. Roath*, 86 Mich. 602 (49 N. W. 500); *Baker v. Kansas City R. Co.* 91 Mo. 152, 158 (3 S. W. 486); *Scott v. Wells*, 6 Watts & S. 357 (40 Am. Dec. 568); *Gano v. Chicago & N. W. R. Co.* 66 Wis. 1 (27 N. W. 628); *Kickland v. Menasha Woodenware Co.* 68 Wis. 34 (60 Am. Rep. 831, 31 N. W. 471); *Story, Agency*, § 85; 4 *Thompson, Corp.* § 5251.

5. The oral agreement extending the time of performance of the contract of sale until the settlement of the overlap controversy was upon sufficient consideration. The mutual agreement of the parties to forebear their respective rights under the contract until that controversy was terminated was sufficient consideration: *Robinson v. Bullock*, 66 Ala. 548, 555; *Pioneer Sav. & L. Co. v. Nonnemacher*, 127 Ala. 521, 546 (30 So. 79); *Connelly v. Devoe*, 37 Conn. 570, 576; *Izard v. Kimmel*, 26 Neb. 51, 57 (41 N. W. 1068); *Bowman v. Wright*, 65 Neb. 661 (91 N. W. 580); *Cutter v. Cochrane*, 116 Mass. 408; *Thomas v. Barnes*, 156 Mass. 581 (31 N. E. 683); *Tingley v. Fairhaven L. Co.* 9 Wash. 34, 39 (36 Pac. 1098); *Long v. Pierce County*, 22 Wash. 330, 348 (61 Pac. 142); *Dyer v. Irrigation Dist.* 25 Wash.

80 (64 Pac. 1009); *Brown v. Everhard*, 52 Wis. 205 (8 N. W. 725); *Ruege v. Gates*, 71 Wis. 634 (38 N. W. 181); Clark, Contracts, § 78.

6. The circuit court correctly charged the jury as to the measure of damages. The measure of respondent's damages was the market value of the land at the time of appellant's refusal to convey, less the unpaid balance of the purchase price. That is the correct measure of damages in all actions of this character: *Mackey v. Olssen*, 12 Or. 429 (8 Pac. 357); *Hopkins v. Lee*, 19 U. S. (6 Wheat.) 109, 118; *Hamaker v. Coons*, 117 Ala. 603, 611 (23 So. 655); *Wells v. Abernethy*, 5 Conn. 222, 227; *Brooks v. Miller*, 103 Ga. 712, 721 (30 S. E. 630); *Gale v. Dean*, 20 Ill. 320, 323; *Plummer v. Rigdon*, 78 Ill. 222, 226 (20 Am. Rep. 261); *Doherty v. Dolan*, 65 Me. 87 (20 Am. Rep. 677); *Kirkpatrick v. Downing*, 58 Mo. 32, 38 (17 Am. Rep. 678); *Hartzell v. Crumb*, 90 Mo. 629, 635 (3 S. W. 59; *Krepp v. St. L. & C. R. Co.* 99 Mo. App. 94, 101; *Wasson v. Palmer*, 17 Neb. 330 (22 N. W. 773); *Shaw v. Wilkins*, 27 Tenn. (8 Humph.) 647 (49 Am. Dec. 692, 696); *Boardman v. Keeler*, 21 Vt. 78, 84; *Cade v. Brown*, 1 Wash. 401 (25 Pac. 457); *Muenchow v. Roberts*, 77 Wis. 520 (46 N. W. 802); *Johnson v. McMullin*, 3 Wyo. 237 (4 L. R. A. 670); *Old Colony R. Corp. v. Evans*, 72 U. S. (6 Gray) 25, 34; 2 Warvelle, Vendors, 959, 960; 3 Sedgwick, Damages (8 ed.), § 1012; 2 Sutherland, Damages (2 ed.), § 579.

7. In any view of the law as administered by the American courts, that is the correct measure of damages* in the case, because where the vendor knows when he makes a contract to sell lands that he has not title, or that his title is in doubt, or where he has in fact title, but he refuses to convey, or where it is in his power to remedy the defect in his title but refuses or neglects to do so, the vendee is entitled to recover the value of the lands at the time they ought to have been conveyed: *Snodgrass v. Reynolds*, 79 Ala. 452 (58 Am. Rep. 601); *Morgan v. Stearns*, 40 Cal. 434; *Irwin v. Askew*, 74 Ga. 581, 585; *Sanford v. Cloud*, 17 Fla. 532, 554; *Plummer v. Rigdon*, 78 Ill. 222 (20 Am. Rep. 261); *Foley v. McKeegan*, 4 Iowa, 1, 8 (66 Am. Dec. 109); *Sweem v. Steel*, 5 Iowa, 353; *Lewis v. Lee*, 15 Ind.

499; *Case v. Wolcott*, 33 Ind. 5; *Duncan v. Tanner*, 25 Ky. (2 J. J. Marsh) 399; *Tracy v. Gunn*, 29 Kan. 362; *Brigham v. Evans*, 113 Mass. 538, 540; *Cannell v. McClean*, 6 Harr. & J. (Md.) 297; *Allen v. Atkinson*, 21 Mich. 351, 362; *Hammond v. Hannin*, 21 Mich. 373 (4 Am. Rep. 490); *Barbour v. Nichols*, 3 R. I. 187; *Carver v. Taylor*, 35 Neb. 429, 434 (53 N. W. 386); *Chartier v. Marshall*, 56 N. H. 478; *Drake v. Baker*, 34 N. J. Law, 358; *Driggs v. Dwight*, 17 Wend. 71 (31 Am. Dec. 283); *Trull v. Granger*, 8 N. Y. 115; *Bush v. Cole*, 28 N. Y. 261 (84 Am. Dec. 343); *Taylor v. Barnes*, 69 N. Y. 430, 434; *Lee v. Russell*, 30 N. C. (8 Ired. L.) 526; *Nichols v. Freeman*, 33 N. C. (11 Ired. L.) 99; *Hartzell v. Crumb*, 90 Mo. 629 (3 S. W. 59); *Cooper v. Simpson*, 41 Minn. 46 (16 Am. St. Rep. 667); *Dustin v. Newcomer*, 8 Ohio, 50; *Hopkins v. Yowell*, 13 Tenn. (5 Yerg.) 305; *Clark v. Locke*, 33 Tenn. (11 Humph.) 300; *Phillips v. Herndon*, 78 Tex. 378 (22 Am. St. Rep. 59, 14 S. W. 857); *Dunshee v. Geoghegan*, 7 Utah, 113 (25 Pac. 731); *Cade v. Brown*, 1 Wash. 401 (25 Pac. 457); 2 Sutherland, Damages (2 ed.), § 581.

8. The circuit court correctly ruled upon the admissibility of evidence going to show the value of lands: *Boom Co. v. Patterson*, 98 U. S. 403, 408; *Snodgrass v. Reynolds*, 79 Ala. 452, 462 (58 Am. Rep. 601); *Little Rock, etc., Ry. v. McGehee*, 41 Ark. 202; *Little Rock J. Ry. v. Woodruff*, 49 Ark. 381, 391 (4 Am. St. Rep. 51); *Illinois & W. R. Co. v. Von Horn*, 18 Ill. 258, 260; *Haslam v. G. & S. W. R. Co.* 64 Ill. 353, 355; *Lafayette B. & M. R. Co. v. Winslow*, 66 Ill. 219, 221; *Chicago & E. R. Co. v. Jacobs*, 110 Ill. 414, 416; *Dupuis v. Chicago & N. W. Ry. Co.* 115 Ill. 97 (3 N. E. 720); *Dickenson v. Inhabitants of Fitchburg*, 79 Mass. (13 Gray) 546-556; 1 Sutherland, Damages (2 ed.), § 450.

MR. JUSTICE BEAN delivered the opinion of the court.

The controlling propositions made by the defendant on this appeal are: First, there never was any agreement or understanding for an extension or waiver of time of performance; second, if such an agreement were made, Schulze had no authority to act for or to bind the defendant thereby; third, if such

contract were made, and Schulze had authority to bind the defendant, it was void because within the statute of frauds, and not in writing; and fourth, the court erred in ruling and instructing the jury that the measure of damages for a breach of the contract was the value of the land agreed to be conveyed at the time of the breach, less the balance due on the purchase price, and in admitting evidence tending to prove such value.

1. The first two points involve questions of fact. They were submitted to and decided by the jury adversely to the defendant, and if there was evidence to support the verdict, it cannot be disturbed. We are only required, therefore, to look far enough into the record to ascertain whether or not this is so, and not to determine whether it is in accordance with the weight of the testimony.

2. The plaintiff testified that he was a half owner with Himpel in the contract for the purchase of the land, and that such fact was known to the defendant and its officers at the time it was made; that after the contract had been executed, in the latter part of the summer or early fall of 1883, Himpel told him that there was a question about the title to the land which the defendant had agreed to sell to them, and that Schulze had been talking to him about it; that thereupon he and Himpel immediately went to the office of Schulze to see about the matter, and Schulze told them that there was a dispute between the defendant and the Northern Pacific Railroad Co. concerning the land, and in his (Schulze's) opinion the Northern Pacific would finally get it; that in view of this controversy he would not accept any further payments on the contract with the defendant until it was settled; that he was the land agent of each company, and that, if the Northern Pacific Co. got the land, he would sell it to them on the same terms, but in that event they must take their money back from the defendant without interest, and without making any trouble; that, if the Northern Pacific should lose the land, they should commence making the payments on their contract with the defendant the same as before; that witness and Himpel agreed to this arrangement, and relied upon the same; that they heard nothing more about the matter, but when the second payment became due witness went to the office

of Schulze to inquire about it, and, finding him out of the city, and having no written contract for the extension of the time of payment, offered to make the second payment to the clerk in charge of the office, who received the money, and made the proper credit on the contract.

Continuing, he says that when Col. Moores, who was acting as land agent during Schulze's absence, learned of the payment, he refused to accept it, and told witness that he had positive instructions from Schulze not to take the money or receive any more payments on the land until the overlap controversy was settled; that the money was then handed back to witness, and Moores erased the credit on the contract by drawing lines with red ink through it; that nothing more was done until about the time the third payment became due, when plaintiff and Himpel again went to the office of the defendant to inquire about the overlap controversy, and to see whether it was ready to receive payments on the contract, and there had a conversation with Mr. Andrews, who in the mean time had succeeded Schulze as land agent; that witness asked Andrews about the controversy, and whether he and Himpel should go ahead with their payments, and talked over with him the arrangements they had made with Schulze; that Andrews said: "Schulze is certainly mistaken about our not getting the land," whereupon Himpel said: "We will make the payments any time that you are prepared to make your deed. We stand prepared to pay the whole contract right up at any time. Are you ready now?" And Andrews said: "No, we are not in a position to make a deed now; there is only one thing to be done, and that is to let the matter rest until this controversy between the Oregon & California Railroad Co. and the Northern Pacific Railroad Co. is settled, and when it is I will personally notify you"; that Andrews took the addresses of witness and Himpel, and they went away from the office; that a few weeks later when witness returned from one of his trips in the country, he found a note to him from Andrews, requesting him to deliver an inclosed sealed letter to Himpel; that on May 3, 1885—the first time he saw Himpel thereafter—he delivered the note to him; that it was from Andrews, dated April 4, 1885, and informed Himpel that the second and third payments on the

contract with the defendant had not been made, and, unless they were within 30 days from date, the contract would be canceled; that witness and Himpel went immediately to see Andrews, and asked him what the letter meant, and Andrews said: "I have sold the land to other parties, and your contract is canceled; you are too late"; that witness and Himpel protested against this action, but Andrews said: "No use to talk about it at all. You are too late. The land is sold"; that they could get no further satisfaction out of Andrews, and so went away.

Himpel corroborates this testimony of the plaintiff, and Schulze himself testified that the refunding to the plaintiff and Himpel of the second payment tendered by them on the contract was made by Moores in pursuance of a general order given by him that no further payments were to be received on the contract because the title to the land was in dispute; that "I gave orders to this effect to my assistant, I. R. Moores, and told purchasers of lands under like conditions at every opportunity that the company would not accept any further payments on lands of this character until the question of title had been settled, but that mean while the contracts should not be forfeited. * * I especially remember in this connection a number of sections sold to the late A. G. Cunningham. This gentleman also tendered payment on his contract, but I refused to accept it for the reasons stated. * * I had also told Himpel before (March 24, 1884)—Himpel and Mr. Neppach, to whom the contract under consideration is now assigned—what the policy of the company would be." This testimony was clearly sufficient for the jury to find in favor of the plaintiff upon the issue of the extension agreement or waiver of the time of performance by the plaintiff and Himpel of the contract made by them with the defendant for the purchase of the land in question. Counsel make a strong and persuasive argument, based upon alleged contradictions and inconsistencies in the testimony and the pleadings and the conduct of the parties, that no such agreement was made or intended to be made; but we are not authorized to review the facts to ascertain whether, in our opinion, the verdict is in harmony therewith. It is sufficient that there was competent evidence to support it.

3. Counsel argue that Schulze had no authority to act for or bind the defendant by such agreement or understanding. This was also a question for the jury, under proper instructions from the court, and there is no contention that such instructions were not given. Schulze's authority was not in writing, and there was no writing introduced in evidence fixing the nature or scope thereof. That had to be ascertained as a fact from divers and sundry items of evidence showing the general course of business in the land department of the defendant during the time Schulze acted as land agent, the authority he exercised, and the duties he performed with the knowledge and approval of the defendant. Many of the facts from which this question was to be determined were in dispute. The defendant contended that Schulze was a mere selling agent, with authority to make sales of land on specified terms and conditions, and that he had no power to make an agreement extending the time of payment by a purchaser or to waive a strict compliance with the contract. The plaintiff, on the other hand, contended that he was the general agent of the defendant, and in charge of its entire land business in Oregon, with full power and authority to represent it in relation thereto, and make any contract with reference to the sale and conveyance of lands which might to him seem advantageous to his principal, or which the exigencies of the business might require. A vast amount of evidence, not necessary to be detailed, was offered by both parties in support of their respective contentions. It was from such testimony that the power and authority of Schulze and the nature and scope of his agency were to be ascertained and determined. The appointment or authority of an agent is a question of fact; what he may do by virtue thereof is a question of law. When the appointment and authority, real or apparent, are admitted, or are not in controversy, the court may declare whether they empower the agent to perform the particular act in question. When, however, there is a dispute as to the appointment or the authority conferred, the fact of such appointment or authority must be found by the trier of fact: *Glenn v. Savage*, 14 Or. 567 (13 Pac. 442); *Hardwick v. State Ins. Co.* 20 Or. 547, (26 Pac. 840); *Connell v. McLoughlin*, 28 Or. 230 (42 Pac. 218); *Long Creek Build. Assoc. v. State Ins. Co.* 29 Or. 569

(46 Pac. 366); *Anderson v. Adams*, 43 Or. 621 (74 Pac. 215).

4. That there was sufficient evidence to support the verdict of the jury that Schulze had authority to make the contract or agreement in question under the law is hardly open for argument. The evidence showed or tended to show that he was appointed land agent of the defendant by its president, and served as such from 1878 to 1884, during which time the defendant was engaged in practically two lines of business and owned and dealt with two classes of property—the one a line of railroad from Portland to the southern part of the State, and the other the listing, selection, sale, disposition, and management of the lands granted to it by congress. The two departments were conducted separately and under different managements. The office of the land department was during a great part of the time in one building; that of the railroad proper in another. The land department was in the sole and exclusive charge of Schulze, who had under him a number of clerks and assistants, who took their orders from him. He listed and selected the lands accruing to the defendant under its grant, fixed the prices and terms at which it was to be sold, made and executed all contracts in reference thereto, and received and receipted for all moneys due on account thereof. During his term of office he thus made and executed on behalf of the defendant more than 1,200 land contracts, duplicates of which were retained by the company, and comprise five large volumes, which were introduced and admitted in evidence. He made various agreements with many of the purchasers from time to time, extending the time of payment or waiving a default for divers and sundry reasons. He was advertised extensively by the defendant in the newspapers and by circulars and maps as its land agent and in charge of its land department, and as the person to whom intending purchasers should apply. In short, he was held out as the authorized representative of the company in that respect, and transacted its entire business in relation to the acquisition, sale, and disposition of its lands. His authority and acts were never disavowed or disapproved by his principal. He testified that he had full charge of the land interests of the defendant in Oregon, made and signed all contracts for the sale thereof, fixed the terms and prices at

which the land would be sold, had charge of its selection and of all the legal business of the company in the local land office; that his authority was never questioned by the company, and he did not remember a single instance where his right to act had been brought in question, or a single act done by him which was not acquiesced in by the company; that he always held that he had full authority to make contracts relating to the disposition of the company's lands. The board of directors and officers of the defendant had knowledge of the authority Schulze was exercising, and what he was doing thereunder, for he made reports to them from time to time of the land sales made by him, and obtained their orders authorizing the execution of deeds to the purchasers. The president of the company resided in New York, and the executive head in Oregon testified that he did not remember ever having been consulted by Schulze as to the management or sale of the lands. Now, it needs no citation of authority to show that the general agent of a corporation clothed with the power thus conferred upon and exercised by Schulze to manage, sell, and dispose of its lands can bind his principal by a valid contract or agreement extending the time of payment by a purchaser of such lands or waiving a strict compliance by him with the contract in that regard.

"The rule is elementary and universal," says Mr. Justice MOORE, "that every grant of power by a principal to his agent, where no limitations are apparent, is to be construed as carrying with it, as an incident thereto, the authority to do all things proper, usual, necessary, and reasonable to carry into effect the objects and purposes sought to be accomplished by the authority conferred": *Durkee v. Carr*, 38 Or. 189 (63 Pac. 117), and authorities cited. That it was the natural and reasonable thing, under the circumstances, for Schulze to make the contract with the plaintiff and Himpel extending the time of payment is apparent. The company was bound by a written agreement to convey a large tract of valuable land upon the payment of the purchase price at certain designated dates and in specified amounts. They were ready and willing to make the payments as agreed upon. The controversy between the defendant and the Northern Pacific Railroad Co. put it out of the defendant's

power for the time being to comply with its contract. If they tendered the payments, it was bound to receive them or be liable to litigation for a refusal. If the payments were made as stipulated, and the money received and accepted by the company, and it should ultimately lose the land, it would not be able to comply with its contract, and therefore be liable in damages for a breach. It was to extricate the defendant from this annoying situation that the agreement was made to extend the time of payment and to waive a strict performance of the contract by plaintiff and Himpel. Such agreement was presumably to the advantage of the company, and was such as a prudent man would probably have made under the same circumstances. It was the "proper, usual, necessary, and reasonable" thing to do, and clearly within the scope and authority of an agent intrusted with the entire management and control of the land business of a corporation: *Johnston v. Milwaukee & W. Inv. Co.* 46 Neb. 480 (64 N. W. 1100); *Anderson v. Coonley*, 21 Wend. 279; *Pratt v. Hudson River R. Co.* 21 N. Y. 305; *Fishbaugh v. Spunaugle*, 118 Iowa, 337 (92 N. W. 58); *National Bank of Repub. v. Old Town Bank*, 112 Fed. 726 (50 C. C. A. 443).

5. But it is argued that the extension contract or agreement was void because it was an oral modification of a contract within the statute of frauds. Ever since the decision of Lord ELLENBOROUGH in *Cuff v. Penn*, 1 Maule & S. 21, holding that a subsequent parol modification of the time of performance specified in a contract within the statute of frauds was valid, there has been much learning exhibited by judges and text-writers in the discussion of such question. The settled doctrine in England now seems to be contrary to that case, and it is now held that an agreement required by the statute of frauds to be in writing cannot be subsequently changed or modified as to the time of performance, or in any other respect, by an oral executory contract: *Stead v. Dauber*, 10 Ad. & El. 57; *Hickman v. Haynes*, L. R. 10 C. P. 598. In this country the cases are in conflict. Some of the courts, notably of Massachusetts, have followed *Cuff v. Penn*, making a distinction between the contract, which the statute requires to be in writing, and the time of performance, to which it is held the statute does not apply. The courts in

other states, and probably a majority, deny the validity of such an agreement, unless acted upon by the parties, and hold that a part of a contract required by the statute to be in writing cannot rest in parol. The cases are referred to and discussed in 29 Am. & Eng. Enc. Law (2 ed.), 824; 30 Am. Law Rev. 863; Wood, Frauds, 758; Benjamin, Sales (7 ed.), § 216; 2 Reed, Stat. Frauds, § 454 et seq.; Brown, Stat. Frauds (4 ed.), § 411; *Abell v. Munson*, 18 Mich. 306 (100 Am. Dec. 165, 169, note); *Bradley v. Harter*, 156 Ind. 499 (60 N. E. 139); *Warren v. Mayer Mfg. Co.* 161 Mo. 112 (61 S. W. 644); *Rucker v. Harrington*, 52 Mo. App. 481; *Cummings v. Arnold*, 3 Metc. (Mass.) 486 (37 Am. Dec. 155); *Stearns v. Hall*, 9 Cush. 31; *Dana v. Hancock*, 30 Vt. 616; *Swain v. Seamens*, 76 U. S. (9 Wall.) 254 (19 L. Ed. 554). The point has never been decided in this State. The oral agreement held void in *Whiteaker v. Vanschoiack*, 5 Or. 113, was more than for a mere extension of time of performance, and introduced new terms into the agreement. In *Sayre v. Mohney*, 35 Or. 141 (56 Pac. 526), the written contract provided that the purchase price of the land should be paid at Salem, but was silent as to the particular place in the city where the payment should be made, and it was held that a subsequent oral agreement, made upon sufficient consideration, designating the place of payment, was valid.

But we deem it unnecessary to decide at this time whether a contract required by the statute to be in writing can be altered as to the time or manner of performance by a subsequent parol executory agreement between the parties. Conceding the law to be as contended for by the defendant, and that the oral extension agreement or contract was invalid as an executory contract, and did not change or modify the terms of the written agreement, it was, nevertheless, acted upon by the plaintiff and Himpel, and the defendant cannot now assert its invalidity to their injury. The stipulation as to the times of payment by them was for the benefit of the defendant, and could be waived by it: 2 Reed, Stat. Frauds, § 459; 2 Warvelle, Vendors (2 ed.), § 819; *Blood v. Hardy*, 15 Me. 61. It did so when it made the agreement that no subsequent payments should be made on the contract until the overlap controversy should be settled and such agreement

was acted upon by them. The agreement was made at the defendant's request, and for its benefit. It had contracted to sell a large tract of land which it feared it would be unable to convey when the time for performance by it arrived. To extricate itself from this dilemma it requested of the vendees a modification of the contract so that the payments would not be made until the controversy as to the title should be settled. The plaintiff and Himpel, in reliance upon this agreement, and at the request of the defendant, refrained from making the payments as they became due, although they were ready and willing to do so. It would certainly be unreasonable to hold, under such circumstances, that the defendant can now insist upon a forfeiture of the contract on account of the failure to make such payments. "We know of no principle of law," says Mr. Chief Justice ANDREWS, in *Thomson v. Poor*, 147 N. Y. 402 (42 N. E. 13), "which will permit a party to a contract, who is entitled to demand the performance by the other party of some act within a specified time, and who has consented to the postponement of the performance to a time subsequent to that fixed by the contract, and where the other party has acted upon such consent, and in reliance thereon has permitted the contract time to pass without performance, to subsequently recall such consent and treat the nonperformance within the original time as a breach of the contract." The same principle is announced by the Supreme Court of Wisconsin in *Marsh v. Bellew*, 45 Wis. 36, 52. It is there said: "We are of the opinion that the waiver of payment at the time fixed in a contract for the sale of real estate, or the extension of the time for such payment, is not such a variation of the terms of the written contract as to exclude it from being received in evidence in a court of equity; and that in all cases where such waiver or extension of time has been given, either by parol or otherwise, and the purchaser has acted upon the faith of such extension or waiver, the courts have held the vendor bound by his contract. Most of the cases put it on the ground that time of payment, as a general thing, in such contracts, is not of the essence of the contract; and some upon the ground that it would be inequitable to permit the vendor, after having induced the vendee to go on with the contract, and expend his

time and money in the further performance thereof, after there had been a technical or other forfeiture thereof, to insist upon the forfeiture, and refuse to perform the contract, because the payments were not made according to the terms of the original contract."

And the doctrine is thus summed up by LINDLEY, J., in *Hickman v. Haynes*, L. R. 10 C. P. 598, 605: "The proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance is, to say the least, very startling, and, if well-founded, will enable the defendants in this case to make use of the statute of frauds, not to prevent a fraud on themselves, but to commit a fraud upon the plaintiff. It need hardly be said that there must be some very plain enactment or strong authority to force the court to countenance such a doctrine. The statute of frauds contains no enactment to the effect contended for." The statute of frauds may not be invoked to perpetrate a fraud, nor will a party be permitted to insist upon the statute to protect him in the enjoyment of advantages procured from another, who, relying on an oral agreement, has acted and placed himself in a situation in which he must suffer wrong and injustice if the agreement is not enforced. A party to a contract for the sale of land, who knowingly consents or agrees to a postponement of the performance by the other at the time specified of some stipulation for his benefit, cannot, after the other has acted upon such consent, avail himself of the default, and treat the contract as forfeited, although the performance of the stipulation at the time specified may have been made of the essence of the contract: 29 Am. & Eng. Enc. Law (2 ed.), 826; *Missouri, K. & T. R. Co. v. Pratt*, 64 Kan. 118 (67 Pac. 464); Brown, Stat. Frauds, §§ 424, 425; *Longfellow v. Moore*, 102 Ill. 289; *Sheridan v. Nation*, 159 Mo. 27 (59 S. W. 972); *Long v. Hartwell*, 34 N. J. Law, 116; *Scheerschmidt v. Smith*, 74 Minn. 224 (77 N. W. 34); *Smiley v. Barker*, 83 Fed. 684 (28 C. C. A. 9); *Stearns v. Hall*, 9 Cush. 31; *Dodge v. Wellman*, 1 Abb. Dec. 512; *Wilber v. Paine*, 1 Ohio, 251; *Fleming v. Gilbert*, 3 Johns. 528.

It may be suggested that the oral agreement between the plaintiff and Himpel and Schulze amounted to more than a

mere extension of time for the performance of the contract by the vendees, but was in the nature of a modification or addition to the agreement itself, because Himpel and the plaintiff agreed that, in case defendant failed to acquire title to the land, they would accept a return of the money paid on the contract without interest, and waive any claim for damages against the defendant for failure to perform. But this was a mere contingent agreement in the nature of a promised waiver by them of a remedy which they might have against the defendant in the future, based upon the happening of an event which did not, and cannot now, occur, and on account of which nothing is claimed in this action. It can in no way affect the rights of the defendant, or relieve it from the effect of its agreement to waive the time of performance after such agreement has been acted upon by the vendees.

If the extension agreement was not valid and binding on the defendant because within the statute of frauds, and amounted to nothing more than an oral stipulation to waive a strict performance of the contract, it probably could have been revoked at any time upon giving the vendees notice of its intention to do so, and a reasonable time after such notice in which to make the prior payments. No such action is pleaded as a defense, or was ever taken by it. Andrews' letter to Himpel of April 4, 1885, makes no reference to the extension agreement, or to the understanding between the vendees and Schulze as to the time in which the payments should be made, or of any intention to revoke or rescind such agreement. Moreover, a reasonable time was not allowed the vendees in which to make the payments after the receipt of such letter. It was dated April 4, 1885, and was not received by Himpel, to whom it was addressed, until May 3d, the day on which the time allowed to make the payments expired.

6. The remaining question involves the competency of evidence given by some of the witnesses as to the value of the timber growing on the land which the defendant contracted and agreed to sell to plaintiff and Himpel, and the proper measure of damages for the breach of the contract. It is the law that the value of real estate cannot be shown by proving the value

of the several constituent elements of value, and then adding these together, taking the aggregate amount as the value of the whole. It would manifestly not be proper, as Mr. Justice COOLEY remarks, to say that "a thousand timber trees upon it are worth so much, a hill of gravel so much, a deposit of valuable clay so much, and when these are all removed the land is still worth so much for agricultural purposes. Consequently, as it is, it is worth the aggregate of all these sums": *Page v. Wells*, 37 Mich. 415, 422. Such an estimate of value would be unfair and misleading, and would introduce into the case speculative and uncertain questions, and would detract from the real question involved, which is, what is the market value of the land as it is? A witness called to testify as to the value of land can take into account everything which goes to make up the value, but he must confine his testimony to the market value of the land as a whole, and not to its several parts. A witness, however, who has given an opinion of value, may be asked on his examination in chief to state the grounds of his opinion: 2 Sutherland, Damages (3 ed.), § 450; *Haslam v. Galena & So. Wis. R. Co.* 64 Ill. 353.

This is the rule adopted and adhered to by the trial court. The court ruled that the value of the land in question could not be ascertained from the estimated stumpage value of the timber growing thereon, but that a witness who had given an opinion as to the market value of the land might state the facts upon which such opinion was based, which in this case involved the character and value of the timber. The witnesses were first asked to give their opinions as to the market value of the land, and, after they had done so, were permitted to state the amount and value of the stumpage as showing upon what they based their opinions; and this they had a right to do under the law, as we understand it. The court instructed the jury that the measure of damages in this case would be the market value of the land at the time of the breach of the contract, less the amount of the unpaid purchase price. Mr. Warvelle says, in speaking on the subject of the measure of damages in an action by a vendee against a vendor for the breach of a contract to convey real estate: "The rule is well established that where the

vendor has title, and for any reason refuses to convey it, as required by the terms of the agreement, he shall respond in damages, and make good to the vendee whatever he may have lost by reason of the breach. So far as money can do it, the vendee must be placed in the same situation with regard to damages as if the contract had been specifically performed; and the measure of such damages will ordinarily be the difference between the contract price and the value of the property at the time of the breach. This has always been regarded as the true measure of damages in actions on contracts for the future delivery of marketable commodities, and it makes no difference in principle whether the contract be for the sale of real or personal property. In both instances the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value, and if it be withheld the vendor should make good to him the difference": 2 Warvelle, Vendors (2 ed.), § 936. Mr. Sedgwick and Mr. Sutherland lay down the same rule: 3 Sedgwick, Damages (8 ed.), § 1012; 2 Sutherland, Damages (3 ed.), §§ 578, 579. And so are the authorities: 29 Am. & Eng. Enc. Law (2 ed.), 724.

7. Where a vendor acting in good faith and without knowledge of a defect in his title agrees to sell and convey land, and is unable to do so because of a failure of title, or if, upon discovery of such defect, he refuses further to perform or to be bound by the contract, leaving the vendee to his action for damages, there is some conflict in the authorities as to whether the vendee can recover anything more than the amount paid, with interest. No such case, however, is presented here. The defendant knew, or was chargeable with knowledge, at the time the contract was made, of the condition of its title, and that the land which it agreed to sell to the plaintiff and Himpel was included in the limits of a prior grant to the Northern Pacific Railroad Co. It did not at any time attempt to repudiate or rescind the contract on account of the controversy about the title, or decline to be bound further thereby on that account, but, on the contrary, induced the vendees to make an agreement or contract with it for its benefit, and upon which they relied and acted, to postpone performance until the title was settled. It does not

plead a want of title as a defense or in mitigation of damages, but avers that it has selected the lands and filed lists thereof in the local land office, which have been approved, and "has duly complied with the terms of such act of congress as aforesaid, and is entitled to patents as aforesaid." It therefore, for the purposes of this case and under the pleadings, occupies the same situation as a vendor who has title to land but refuses to convey. In such case the authorities are that the vendee may recover for the loss of his bargain, and that the measure of damages is the value of the land agreed to be conveyed at the time of the breach, less the amount, if any, of the purchase price unpaid. This was the rule adopted by the trial court.

There being no error in the record, the judgment is affirmed.

AFFIRMED.

Argued 7 February, decided 10 April, 1905.

MOORE MFG. CO. v. BILLINGS.

80 Pac. 422.

46	401
448	243

ATTACHMENT LIEN—NEED OF ORDER OF SALE—WAIVER.

1. To preserve and continue an attachment lien the judgment order must direct the sale of the property seized, and the entry in an attachment action of a simple money judgment operates as a waiver of the lien.

LIEN ACQUIRED BY CREDITORS' SUIT AFTER BANKRUPTCY.

2. A creditors' bill instituted subsequent to an adjudication of bankruptcy does not create a lien on the property sought to be reached.

WHO MAY SUE TO AVOID FRAUDULENT TRANSFER BY BANKRUPT.

3. Under Bankr. Act July 1, 1898, § 70, authorizing the trustee to avoid any transfer of property made by the bankrupt which any creditor might have avoided and to recover the property from the person having it in his possession, the trustee alone, to the exclusion of creditors who have no special lien on the property, can maintain a creditors' bill to set aside a fraudulent transfer of property by the bankrupt.

From Multnomah: MELVIN C. GEORGE, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is a creditors' suit by the Moore, Schafer Shoe Mfg. Co. against Moses Billings and others, by which it is sought to set aside a certain chattel mortgage and sale made thereunder of a stock of merchandise, because in alleged contravention of the statute relating to the sale and transfer of goods in bulk, and as fraudulent and void as to the creditors of the defendant Billings. The succession of events leading up to the institution of the suit are, in brief, as follows: The plaintiff is a creditor of Billings.

On December 23, 1902, the latter executed to the defendant Andrew a chattel mortgage, whereby he sold, transferred, and delivered into the possession of Andrew his entire stock of merchandise, consisting of boots, shoes, slippers, etc. Thereafter Andrew exercised exclusive rights of ownership over the property until January 12, 1903, when he sold and transferred it to the defendant the Goddard-Kelly Shoe Co. Within the same month plaintiff commenced an action in the circuit court for Multnomah County, and recovered a judgment upon its demand against Billings. About a year later, to wit, in January, 1904, plaintiff caused execution to issue upon the judgment, and a writ of garnishment to be served upon the Goddard-Kelly Shoe Co., which answered that it had no property in its hands belonging to Billings, whereupon, on March 2, 1904, the sheriff made a nulla bona return of the execution. Some time in February, 1904, Billings was, upon his own petition, adjudged a bankrupt. This suit was commenced March 8, 1904. The complaint sets out the current of facts thus recounted, with apt allegations charging that the chattel mortgage executed by the parties concerned, the delivery of the merchandise into the hands of Andrew, and the sale and delivery of possession subsequently by him to the Goddard-Kelly Shoe Co. were in reality means adopted by which to effectuate a sale of the goods in bulk to the shoe company; that such sale was consummated and the purchase price paid by the vendee without requiring five days' previous written statement under oath from the vendor containing the names and addresses of all his creditors, and without giving to such creditors notice as is prescribed by Sections 4623 and 4624, B. & C. Comp., relating to the purchase, sale, and transfer of goods in bulk, and was otherwise made and entered into by the parties concerned with the purpose and intent of defrauding the creditors of Billings; by reason whereof the said sale is void and ineffectual as against the demand of plaintiff. It is further alleged that the plaintiff caused to be issued in the action against Billings a writ of attachment, and the same to be levied upon the goods which were the subject of the sale. The court, however, did not direct a sale of the property, but rendered a simple money judgment only. Demurrers

were interposed to the complaint by defendants, and, being sustained, the suit was dismissed, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Emmons & Emmons* and *C. A. Sehlbrede*, with an oral argument by *Mr. William Henry Fowler*.

For respondents there was a brief over the names of *William D. Fenton* and *Arthur C. Spencer*, with an oral argument by *Mr. A. C. Spencer* and *Mr. Rufus Albertus Leiter*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

1. The question for our determination is whether, under the complaint, the plaintiff is in a position to maintain a suit against the defendants. Preliminarily it must be observed that the plaintiff has no lien on the goods by virtue of the alleged levy of the writ of attachment issued in the action instituted against Billings and recovered on its demand. There was no order entered adjudging the property to be sold at the time of the rendition of the judgment in the action. This was tantamount to a waiver of the attachment lien if one was legally and regularly obtained, and a liberation of the goods from the effect of such levy. The principle was recognized in *Bremer v. Fleckenstein*, 9 Or. 266.

2. Nor did the plaintiff acquire a lien upon the goods by reason of the institution of the present proceeding, treating the complaint as a creditors' bill, which it really is, because it was commenced subsequent to the date when the defendant Billings was adjudged a bankrupt, and there was no *lis pendens* as it respects that adjudication. So that the plaintiff is proceeding here as if it had instituted the suit simply against the alleged fraudulent debtor and his vendees, after the debtor had been adjudged a bankrupt, and, we may well assume, while the bankruptcy proceedings were still pending, being so soon after the adjudication. Section 70, Bankr. Act July 1, 1898, c. 541 (30 Stat. U. S. 544, 565, U. S. Comp. St. 1901, p. 3451, 1 Fed. Stat. Ann. 525, 697), provides that the trustee of an estate of a bankrupt upon his appointment and qualification shall be in-

vested by operation of law with the title of the bankrupt as of the date he was so adjudged, except as it relates to property exempt from execution; and, further, that he may avoid any transfer by the bankrupt of his property which any creditor of his might have avoided, and may recover the property so transferred, or its value, from the person having it in his possession, unless he was a bona fide purchaser for value prior to the date of the adjudication. This statute has been construed in accordance with its plain reading, and under it a trustee may maintain a suit to recover property transferred in fraud of creditors whenever the creditor could have prosecuted it had it not been for the adjudication in bankruptcy: *Andrews v. Mather*, 134 Ala. 358 (32 South. 738); *In the Matter of Gray*, 47 App. Div. 554 (62 N. Y. Supp. 618); *Norcross v. Nathan* (D. C.), 99 Fed. 414; *In re Rodgers*, 125 Fed. 169 (60 C. C. A. 567). Not only is this true as a legal principle, but the trustee alone can sue to the exclusion of the creditors: *Black*, Bankruptcy, 266; *Leseure v. Weaver*, 108 Ill. App. 616; *Glenny v. Langdon*, 98 U. S. 20 (25 L. Ed. 43); *Trimble v. Woodhead*, 102 U. S. 647 (26 L. Ed. 290); *Moyer v. Dewey*, 103 U. S. 301 (26 L. Ed. 394); *In re Adams*, 1 Am. Bankr. Rep. 94. This court has held that the trustee is the only person who can sue to recover upon stock subscriptions from the stockholders of an Oregon corporation: *Falco v. Kaupisch Creamery Co.* 42 Or. 422 (70 Pac. 286). And, while it does not go to the extent of the case under consideration, it is very persuasive in support of the limitation of the right to prosecute a creditors' bill to the trustee alone.

The principle underlying the rule is, as it was under the law of 1867, that "the filing of the petition (in bankruptcy) is a caveat to all the world, and in fact an attachment and injunction," and on adjudication the title of the bankrupt becomes vested in the trustee: *Mueller v. Nugent*, 184 U. S. 1 (22 Sup. Ct. 269, 46 L. Ed. 405). In other words, the procedure operates to place the property in custodia legis, and the trustee, being the arm of the court, is the law's proper custodian. While the property may not, in fact, have passed into the present possession of that officer as in the case at bar, where it has been trans-

ferred by the bankrupt in fraud of creditors, yet the law has given him plenary power and authority to possess himself of it. He has both title and right of possession. When he sues to recover it, he acts in the right of all the creditors, because he must distribute the proceeds equally among all, unless there be a preference by way of lien previously acquired. The creditor before him, or any number less than all, might have disincumbered the property of the fraudulent conveyance, but they would have been rewarded for their diligence to the exclusion of those not participating in the litigation, and, if now permitted to sue, their legal rights would be in contravention of the rights of the trustee. His right of recovery and theirs could not, therefore, be exercised at the same time. But it is the purpose of the law to secure to all the creditors a just and equal division and distribution of the property of the bankrupt. This purpose, conjoined with the idea of the investment of the trustee with the title and right of possession, renders the intendment clear that he alone can sue to possess himself of the property, or to recover it where transferred in fraud of creditors. His authority, therefore, to sue in the right of the creditors is paramount and necessarily exclusive of their right to prosecute a creditors' bill. The authorities of the appellant, cited in disparagement of this position, are all where the creditor has acquired some lien, either by express agreement, by attachment, previous judgment, or by the institution of a creditors' suit, whereby the plaintiff acquires a legal status and a better right to the property or funds than other creditors. We cite the following: *National Bank of the Repub. v. Hobbs* (C. C.), 118 Fed. 626 (9 Am. Bankr. Rep. 190); *Pickens v. Dent*, 187 U. S. 177 (23 Sup. Ct. 78, 47 L. Ed. 128, 9 Am. Bankr. Rep. 47); *Ninth Nat. Bank v. Moses*, 80 N. Y. Supp. 617 (11 Am. Bankr. Rep. 772), this latter case having been decided by the New York Supreme Court. These can have no application under the facts which characterize the case at bar.

The demurrer being properly sustained, the decree of the circuit court will be affirmed, and it is so ordered. AFFIRMED.

Argued 21 February, decided 24 April, 1905.

WELCH v. KINNEY.

80 Pac. 648.

NOTES—ACTION BY AGENT AGAINST HIS PRINCIPALS.

1. Where a number of persons not incorporated, and not organized so as to become a legal entity, jointly own a note made by one of them, an agent of them all cannot sue on such note under an assignment for collection, since in such a case the maker would be suing himself through his agent.

OWNER OR HOLDER OF NOTE.

2. The holder of a note is one who has possession of it and is demanding payment, but such a person is not necessarily the owner, so a finding only that one is the holder of a note is equivocal.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is an action by James W. Welch against M. J. Kinney, based upon a promissory note executed by the defendant to G. Wingate, and contains, among other usual allegations, the following: "That said note has been, for a valuable consideration, duly assigned to this plaintiff, and that plaintiff is now the owner and holder thereof." The answer denies every material allegation, except, perhaps, the sheer execution of the note on the part of the defendant, and sets up three separate defenses. These latter are not material to the questions involved. The case was tried before the court, a jury having been waived, which made findings of fact responding specifically to all the allegations of the complaint, except it found that the plaintiff was the holder of the note, omitting reference to ownership; to which findings the defendant duly excepted on the ground that they and each of them were not supported by the evidence. Judgment having been rendered on the findings in favor of plaintiff, the defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Edward Byers Watson* and *George Hannibal Durham*, with an oral argument by *Mr. Watson*.

For respondent there was a brief and an oral argument by *Mr. Frank J. Taylor*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The facts material to the controversy are, in substance, these: On March 30, 1895, Alfred Kinney and 20 others, styled

the "Committee of Direction," entered into a written agreement with A. B. Hammond, whereby they agreed to procure for him the right of way, free of expense, in consideration that he would construct a railroad from Goble to Astoria, in Oregon. This Committee of Direction, through the instrumentality of Wingate, one of its members, and others acting in its behalf and for the promotion of its purposes, procured many subscriptions of money and property to be used in securing the right of way, and, among others, procured the note of the defendant, being the one in question, to be executed to Wingate personally, the same representing the maximum amount which defendant should be called upon to contribute to said committee. Hammond not being fully satisfied with the arrangements with the Committee of Direction, another committee was formed, known as the "Guaranty Bond Committee," consisting of 25 persons, the defendant being one of them, who guaranteed to Hammond the right of way desired for his road, which they did in consideration, among other things, that the Committee of Direction would assign, set over, and transfer to them all the subscriptions to the right of way theretofore acquired. This was accordingly done, the makers of the subscription notes and checks and other forms of subscription joining in a written request and authorization to the payees to deliver the same to such bond committee, and further authorizing the committee to use them for the purpose for which they were designed. Thus it is that the bond committee acquired its right and title to the note in suit. To this point there is no objection to any phase of the transaction, and it is conceded that the title and right to enforce collection was perfectly vested in the bond committee.

On September 3, 1895, at a meeting of the bond committee, a resolution was adopted whereby the president, secretary, and vice president were constituted an executive committee, with "full power to act in all matters pertaining to the rights of way; * * also with power to negotiate and sell notes or paper owned by this committee." On November 15, 1898, the committee authorized the executive committee to collect all the additional notes and the "Thompson subscription notes" by suit

or otherwise, and on December 2 authorized such executive committee to proceed to collect all assets. The defendant was present at each of these three meetings of the bond committee. On April 7, 1902, at a meeting of the executive committee, it was resolved "that all notes, bonds, and other indebtedness due and owing to the Guarantee Bond Committee be, and the same are now, sold and assigned and transferred to James W. Welch, Esq., of Astoria, Oregon, for collection," and, further, "that the president and secretary be and they are now authorized to execute all necessary papers and assignments or otherwise to carry title to said notes and other evidence of indebtedness, and deliver the same to the said James W. Welch for the purpose aforesaid." The plaintiff testified that he is the holder of the note; that he procured it from the agents of the bond committee, it being assigned to him by them; and, on cross-examination, that he paid nothing for the note, and that it was assigned to him as agent and collector, thereby clearly indicating the capacity in which he holds it. These facts are undisputed, there being nothing in the record to gainsay or contradict them in any way; and the question arises, can plaintiff maintain the action? In other words, is his title and interest in the paper such as he may sue Kinney, a member of the bond committee, and recover at law?

1. If the plaintiff were the owner of the note in the legal sense that it was his in his own right, a different question might arise. But he is not; he is but a holder for collection, and his rights are not broader, nor more to be conserved, than those of the Guaranty Bond Committee, which has the legal title to the paper; and, in effect, he is suing in the right of such committee. By the latest expression of this court, speaking through Mr. Justice BEAN, it was said that a promissory note indorsed "for collection" was "not strictly a contract of indorsement, but rather the creation of a power, the indorsee being the mere agent of the indorser to receive and enforce payment for his use. The title to the note and the proceeds thereof remain in the payee, and he may maintain suitable actions and proceedings to enforce his right": *Smith v. Bayer*, 46 Or. 143 (79 Pac. 498). And it was held that an indorsee was not a holder

for value so as to cut off defenses against the indorser. Such is undoubtedly the true principle: 2 Randolph, Com. Paper (2 ed.), § 726. The bond committee is composed of individuals, but not incorporated or otherwise organized so as to become a distinct entity, and it is only in a joint capacity that they hold or possess any title to the note. Being joint owners, they must all join in the action: 15 Enc. Pl. & Pr. 528. None less than the whole number can sue, unless by reason of the death of one or more of them. By suing through their agent, they are themselves suing, and the result is that Kinney is suing himself against his own protest. Thus is involved a "legal absurdity," as characterized by Mr. Chief Justice SHAW in *Warren v. Stearns*, 19 Pick. 73, and the action cannot be entertained.

2. It is contended on the part of the defendant that the effect of assigning his note to the bond committee of which he was a member was to discharge and extinguish it at law, but such a result could hardly follow. The defendant participated in all the proceedings, and there is no intendment of that nature to be found anywhere in the relations between the parties. Some stress is laid upon the fact of defendant's active participation in the affairs of the committee as being inimical to his defense, but they are not adequate to confer a right of action against himself, which is the vital infirmity of plaintiff's cause. The finding of the court that plaintiff is the holder of the note is equivocal under the pleadings. "The term 'holder' is properly applied to a person having possession of the paper and making the demand, whether in his own right or as agent of another": 15 Am. & Eng. Enc. Law (2 ed.), 509; *Bowling v. Harrison*, 47 U. S. (6 How.) 248 (12 L. Ed. 425). Now, if it was intended to find that plaintiff was the holder in the sense that he was the owner, the finding is not supported by the evidence; for it is all the other way, without a scintilla of proof to contradict it so as to involve any dispute of fact. But if it was intended to indicate merely that plaintiff was the holder for collection, as agent of the bond committee, without any other title, then the finding does not support the judgment, for in that sense, as we have seen, the defendant is placed in the position of suing himself, which the law does not sanction.

The judgment will therefore be reversed, and the cause remanded for such further proceedings as may seem proper.

REVERSED.

Argued 4 April, decided 28 April, 1905.

MARSHALL v. CARDINELL.

80 Pac. 652.

MECHANIC'S LIEN—EVIDENCE OF POSTING NOTICE BY OWNER.

1. The evidence in this case shows a posting of a notice on the house in the repair of which the labor and material in question were furnished, to the effect that defendant would not be responsible for the labor and material.

NOTICE OF NONLIABILITY BY OWNER—CONSPICUOUS PLACE.

2. A notice posted on the front of a building on a public street, in such a position as to be readily observed by persons entering the building both by the stairway and on the first floor, is in a "conspicuous place," within B. & C. Comp. § 5643, providing that a property owner may be relieved of liability for liens by posting a certain notice.

PRESUMPTION CONCERNING POSTED NOTICE.

3. Where a notice under B. & C. Comp. § 5643, that the owner of a building will not be liable for repairs thereon, is posted in good faith by the owner, a presumption arises that it remained a sufficient length of time to impart knowledge to the persons it was intended to affect.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is a suit by James I. Marshall against Charles Cardinell. Plaintiff is the holder of two mechanic's liens—one claimed by himself for labor and materials furnished one W. W. Allen, lessee, for the repair of a certain building known as the "Avalon Cafe," at Nos. 269, 269½ and 271 Everett Street, Portland, Or., owned by the defendant, Charles Cardinell, and another claimed by Sutcliffe & Blied for work performed and materials furnished Allen in plastering, papering, and painting parts of the building. These liens Marshall is seeking to foreclose. The only defense interposed is that the defendant, within three days after obtaining knowledge of the contemplated alteration and repairs by Allen, gave notice that he would not be responsible therefor, by posting a notice in writing to that effect in a conspicuous place upon the building, and therefore that the property ought not to be subjected to the burden of such liens. The defense was successful, and, the suit having been dismissed, the plaintiff appeals.

AFFIRMED.

For appellant there was brief over the name of *Bronaugh & Bronaugh*, with an oral argument by *Mr. Jerry England Bronaugh*.

For respondent there was a brief over the names of *Arthur C. Emmons* and *Cyrus A. Dolph*, with an oral argument by *Mr. Dolph*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The only questions urged here are, first, whether the evidence establishes the posting of any notice as alleged; and, second, whether the notice, if posted, operated to give such notice of the owner's refusal to become responsible for the cost of the improvement or repairs as is contemplated by statute.

1. The first question is entirely one of fact. The repairs consisted, among other things, in reconstructing the front of the building on the first floor; it being torn away, either partially or completely, and another put in of a different design. The plaintiff began work under his contract on April 11, 1904, and Sutcliffe & Blied about two days later. Thomas Jones, who was agent of Cardinell, testifies that he posted a notice on April 11th on the front of the building in form and language following:

"NOTICE.

I hereby forbid any person furnishing any material of any kind, or making any improvement or alterations, or doing any manner of work whatsoever on these premises, 269 and 269½ Everett Street, at my expense, for I will not be responsible for the same.

Chas. Cardinell.

Per T. Jones, Agent."

It was contained on a sheet of letter paper, small size, written by Jones in a large, legible hand; the sheet being fastened with a tack at each corner, about as high as a man could reach easily upon a post in the front, standing between the stairway entering from the outside and the front opening into the building. Two other witnesses were called who saw him post the notice, one of whom read it, and was able to say by whom it was signed. Others saw it while in place where posted, and were able to detect it from across the street. One of these witnesses was a workman in the building at the time the alterations and repairs

were made. This affords very substantial evidence of a positive nature of the posting, all the witnesses having seen and observed the notice while in place. Against this testimony the plaintiff produced numerous witnesses, most of them workmen in and upon the building at the time, who testified that they never saw the notice, although they had ample opportunity, thus controverting the testimony of the defendant; but, being negative in character, it is not so satisfactory or convincing as his. The testimony of a person who asserts that he saw a thing is inherently stronger than that of another of equal veracity who says that he did not see it, unless both were intent upon observing for a specific purpose and noting a condition. Not so in the present instance. The defendant's witnesses saw the notice, took note of it, and were able to testify to the fact, while the witnesses of plaintiff had an equal opportunity of seeing, but did not. None of them were looking for the purpose of ascertaining whether a notice was to be found there, or not, except one, and he did not find it. Although the testimony of this witness is of a more positive type, upon the whole we think the defendant has made the better case as to the posting. Indeed, it seems hardly possible that there should be any mistake about it, in the face of the statements of three witnesses who actually saw the notice nailed up, one of them performing the service.

2. As to the remaining question, the statute requires that the owner shall, within three days after he has knowledge of the fact that alterations or repairs are being made, give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place on the land or building or other improvement situate thereon: Section 5643, B. & C. Comp. The form and subject-matter of the notice in question are obviously sufficient, but the inquiry is whether it was kept in place a sufficient length of time, so that it might be said that the owner gave notice of his refusal to be responsible for the improvements. From the description of the place where posted, it would seem that it was a conspicuous place. It was on the front of the building, bordering on the public street, and was observed by people passing and repassing, and its position was such that

it would be readily observed by persons entering the building both by the stairway and upon the first floor. No more public or conspicuous place upon the building could have been selected. Just how long the notice remained on the building is problematical. Jones says he saw it two or three times afterward, and as much as an hour later, and one witness testified that he saw it more than half a dozen times, and on different days. It may have been torn down when the front was taken out of the building, but this does not appear. There is nothing from which we might infer anything but good faith on the part of Jones in giving the notice.

3. The statutory manner of giving notice is by posting a written announcement; presuming, no doubt, that when once posted it will remain a sufficient length of time to impart knowledge to the persons it is intended to affect. The language is not to keep it posted, but to give notice by posting, and when once posted it will fulfill the mandate of the statute. Of course, if the notice were torn down immediately, or very soon after, by the one who posted it, there would be an apparent attempt to evade the statutory injunction, and the act would probably not be accounted as giving notice by posting; but, if posted in good faith, with the intent and purpose that it should remain as long as a notice would remain in a place of that nature under ordinary conditions, it would seem that the intendment of the statute had been observed and the notice given. We are satisfied that the notice in the present instance was posted in good faith, and the posting sufficient to fulfill the requirements of the statute in giving notice to relieve the defendant of responsibility for the work done.

The decree of the trial court will therefore be affirmed, and it is so ordered.

AFFIRMED.

Argued 30 March, decided 28 April, 1905.

MONTAGUE *v.* SCHIEFFELIN.

80 Pac. 654.

SUFFICIENCY OF TESTAMENTARY WRITING—WITNESSES.

1. A paper purporting to be a will, but not witnessed, executed in another State by a person not a mariner or soldier, is not entitled to probate in Oregon, under Sections 5548 and 5561, B. & C. Comp. and is not effectual to transfer the title to real property in this State.

A LETTER NOT A WILL OR CODICIL.

2. An ordinary letter is neither a will nor a codicil, being unattested, as required by Sections 5548 and 5575, B. & C. Comp.

SUFFICIENCY OF UNPROBATED DOCUMENT TO CONVEY PERSONAL PROPERTY.

3. A document insufficient as a will, under the laws of Oregon, and not probated elsewhere, is not evidence of any statements therein contained as a bequest of personalty.

From Washington: THOMAS A. MCBRIDE, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is a suit by Richard W. Montague, as trustee in bankruptcy in the matter of the estate of Effingham L. Schieffelin, bankrupt, against Jay L. Schieffelin and others to subject an undivided one-fourth interest in the estate of Edward L. Schieffelin, deceased, to the payment of the debts of the bankrupt, which interest it is alleged is held in trust for him by Jay L. Schieffelin. The alleged trust relations and title are dependent for their validity and legal existence upon certain papers, one denominated the "last will" and the other in form a letter left by deceased at the time of his death. They are, so far as it is necessary to set them out, in language following:

"LAST WILL.

"1st. I give to my wife, Mary E. Schieffelin, all interests, both real and personal properties, I may die seized of in Alameda and Santa Clara counties, California. Also fifteen (15 \$1000) one thousand dollar University of Arizona bonds and all other properties I may die seized of, both real and personal, wherever the same may be situated, I give to my brother, Jay L. Schieffelin, as Trustee.

"2d. As soon as the fifteen (\$15,000) thousand dollar Equitable Life Insurance Policy and the money for the United States Bonds (suit now pending) in the hands of John Sparhawk, Jr., of Philadelphia, Pennsylvania, have been collected, and all personal debts have been paid, the balance I give to my wife Mary E. Schieffelin and my brother Jay L. Schieffelin as Trustee, share and share alike. * *

"5th. I appoint without bonds, as my executors, my wife, Mary E. Schieffelin, and my brother, C. L. Schieffelin.

"6th. This is my last will and testament, written under no influence and in sound mind, at home, fifteen (1511) hundred and eleven Central Avenue, Alameda, California, the sixteenth (16) day of September, eighteen (1896) hundred and ninety-six.

Ed. Schieffelin.

(Indorsed) Last Will of Ed. Schieffelin, Sept. 16, 1896."

"To my Brother Jay L. Schieffelin :

A Request.

Dear Jay :

"You will see by my will of September 16th, 1896, that I have left my property, real and personal, to you as Trustee, and to my wife Mary E. Schieffelin. I want you as soon as you think it desirable, to give to our niece Lulu Dunham the Seventh (7th) street property in the City of Los Angeles, California.

"And all other monies and property, real and personal, that may come into your hands from my estate, I want you to collect all rents and incomes from the same; and whenever you think it advisable, after deducting all necessary expenses, divide the balance between yourself, our sister Lizzie Guirado, our brothers C. L. Schieffelin and E. L. Schieffelin, share and share alike, until such time as you think it advisable to either divide the property as you receive it or sell it and divide the proceeds. Either way, I want yourself, our sister Lizzie Guirado, and our brothers C. L. Schieffelin and E. L. Schieffelin, to share in all property that may come into your hands from my estate except that given to our niece, Lulu Dunham. Whenever you think such division advisable, it might be advisable to consult with our sister and brothers about the manner and time of making such division. However, use your own discretion about it.

Your brother,

Ed. Schieffelin.

1511 Central Avenue, Alameda, California.

April 10th, 1897."

Effingham L. Schieffelin and C. Fannie Schieffelin, his wife, answered separately, suggesting two defenses, one partial and the other complete. The partial defense consists of an averment that certain of the alleged indebtedness of the bankrupt is unconscionable, and the complete defense in the further averment that the alleged trust was created as a spendthrift's trust to prevent the dissipation of the property that Effingham would otherwise have inherited from the deceased. A demurrer to these answers being overruled, and plaintiff refusing to plead further, defendants moved for a decree dismissing the complaint upon the ground of plaintiff's failure to controvert the new matter, which motion was sustained, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Samuel*

Hiram Gruber and Bauer & Greene, with an oral argument by *Mr. Gruber*.

For respondents there was a brief and an oral argument by *Mr. John Hicklin Hall*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

1. The only question which need be considered in this case is whether Effingham L. Schieffelin acquired any right or title to the property in question by virtue of the papers left by the deceased, which it is alleged are his last will and codicil thereto. The question is made here upon the complaint that it does not state facts entitling the plaintiff to the relief demanded. The plaintiff derails title for Effingham wholly through these supposed muniments. If they are insufficient or inadequate for the purposes of a devise or bequest transferring title from the deceased to Effingham, then it must be assumed that he has no interest therein, or it would have otherwise been set out. The statute of this State provides the specific manner in which a will shall be executed; that is, it shall be in writing, signed by the testator, and attested by two or more competent witnesses. A codicil must be executed with the same formality: B. & C. Comp. §§ 5548, 5575. The only exception to this manner of disposing of property by will is in the case of a mariner or soldier in the military service: B. & C. Comp. § 5558. The statute further provides that any person not an inhabitant of but the owner of property, real or personal, in this State, may devise or bequeath such property by last will, executed, if real estate be devised, according to the laws of this State, or, if personal property be bequeathed, according to the laws of this State or of the state or territory where executed. If probated elsewhere, certified copies of the will and probate may be recorded in the same manner as wills executed and probated in this State, and are thereafter entitled to be admitted in evidence in the same manner and with like effect: B. & C. Comp. §§ 5561, 5562. By reference to the documents in question it will be seen at a glance that the alleged will is not attested in the manner thus required. It was not, therefore, entitled to probate in this State, as it pertains to

the realty, and was wholly insufficient as a muniment to convey the title thereto to the alleged legatee.

If, however, it was executed according to the laws of California, where the deceased resided at the time of his decease, it would be sufficient to carry title to the personal property; but about this it is unnecessary to inquire.

2. If we admit, as is alleged in the complaint, that the document was duly admitted to probate in Washington County, it of itself carried no title or interest to Effingham L. Schieffelin. Everything not given to the wife was devised and bequeathed to Jay L. Schieffelin, trustee, and the alleged will does not state who were intended to be the cestuis que trustent. Now, to complete the chain of title so as to constitute Effingham one of four of such cestuis que trustent, the plaintiff relies wholly on the letter of April 10, 1897. This letter was not attested as a will or a codicil according to the laws of this State, and therefore it also is clearly not sufficient as a devise of the realty: *In re Clayson's Will*, 24 Or. 542 (34 Pac. 358); *Orth v. Orth*, 145 Ind. 184 (42 N. E. 277, 41 N. E. 17, 32 L. R. A. 298, 57 Am. St. Rep. 185); *Magoohan's Appeal*, 117 Pa. 238 (14 Atl. 816, 2 Am. St. Rep. 660).

3. As it concerns the personal property, the alleged codicil, as it appears from the complaint, has never been probated, either in California or here, and it cannot be utilized as evidentiary of Effingham's right or title, if the paper were otherwise competent to declare and fix a trust: *Jones v. Dove*, 6 Or. 188; *In re Johns' Will*, 30 Or. 494, 501 (47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242).

It follows that the decree of the circuit court dismissing the suit was properly rendered, and will therefore be affirmed.

AFFIRMED.

Argued 29 March, decided 28 April, 1905.

SCOTT v. CHRISTENSON.

80 Pac. 731.

PLEADING STATUTE OF LIMITATIONS.

1. A claim under the statute of limitations is an affirmative defense, and must be specially pleaded, unless it is apparent from the face of the complaint that the cause of action is barred.

LIMITATIONS—BURDEN OF PROOF—EXCEPTION TO RULE.

2. While it is a general rule that a party pleading the statute of limitations has the burden of proving his claim, there is an exception where the complaint shows that the cause of action would be barred but for certain facts that are stated. In such a case the defendant does not have the burden of proving a defense of limitations, though pleaded, but the plaintiff must prove his allegations, including the special facts relied upon to avoid the statute. Therefore a charge that the defendant, having pleaded the statute of limitations, must establish such defense by a preponderance of proof is not always correct, and in this case it was error.

From Marion: **GEORGE H. BURNETT**, Judge.

This is an action by Chas. Scott as executor of his father's estate against M. and H. Christenson, resulting in a judgment for plaintiff, from which both defendants appeal. **REVERSED.**

For appellants there was a brief and an oral argument by *Mr. Frank Holmes*.

For respondent there was a brief with oral arguments by *Mr. Charles William Corby* and *Mr. Harry J. Bigger*.

MR. JUSTICE BEAN delivered the opinion of the court.

This action was commenced in September, 1904, on a promissory note executed and delivered by the defendants to the plaintiff's testate on April 26, 1893, for \$74, due one year after date, with interest at 8 per cent per annum. The complaint alleges that no part of the note has been paid, except \$20.50 paid on January 19, 1897, and two dollars on January 2, 1899. The answer denies all the allegations of the complaint, except the execution of the note and the plaintiff's representative capacity, and, for an affirmative defense, alleges that on or about November 20, 1895, one of the defendants paid on the note \$55 in coin, and, at some time not stated, the other defendant paid and satisfied the remainder of the note in full, by the sale and delivery to the payee of a load of grain; that no payments have been made on the note by the defendants, or either of them, since the 20th day of August, 1896, and the action was not commenced within six years from the time of the last payment, and is therefore barred by the statute of limitations. The reply denied the allegations of the answer. A trial was had before a jury, and the court instructed them, among other things, that the defendants, having pleaded the statute of limitations, must establish such defense by a preponderance of the proof.

1. The statute of limitations is an affirmative defense which a defendant is bound to plead specifically, unless it appears from the face of the complaint that the action is barred, and the general rule seems to be that the burden is on him to sustain such defense, when pleaded: 19 Am. & Eng. Enc. Law (2 ed.), 332.

2. In this case, however, the application of such a rule would require the defendants to prove that the payment of the two dollars alleged by the plaintiff to have been made on the note within six years before the commencement of the action was not made. This would be equivalent to making the averments of the complaint in this regard prima facie true. In order to avoid a demurrer on the ground that the action was barred, the plaintiff was required to, and did, plead the payment. This averment is denied by the answer, and the defense of the statute of limitations pleaded. The plea is grounded on the denial, and, if the burden is on the defendants, the result will be a presumption that such payment was in fact made. Now, the note was barred, and therefore furnished no evidence of a present liability against the defendants, unless a payment was made thereon by them within six years prior to the commencement of the action. The burden of proof to establish such payment was on the plaintiff: Wood, Limitations (3 ed.), § 116; *Harding v. Grim*, 25 Or. 506 (36 Pac. 634). But the instruction, as given, relieved him of that duty, and imposed the burden of proving a negative on the defendants; and this, we think, was error. Whether the production by a plaintiff of a promissory note, with an indorsement of a payment thereon made by the promisee before the note is barred by the statute, is prima facie evidence of such payment, and shifts the burden to the defendant to show that the payment was not in fact made, as would seem to be the rule in some jurisdictions (Wood, Limitations, 3 ed., § 115; *Shepherd v. Calhoun*, 72 Ill. 337; *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505), is a question not necessary to be considered at this time.

Judgment reversed and new trial ordered.

REVERSED.

Argued 4 April, decided 15 May, 1905.

LIVESLEY v. MUCKLE.

80 Pac. 901.

VENDOR AND PURCHASER—WAIVER OF TERMS OF CONTRACT.

1. Where a contract provided that defendant would start a mill and demonstrate that it could be successfully run, and then would execute a lease to plaintiff, but plaintiff, immediately upon the making of the contract, entered into possession of the mill himself, and successfully ran the same without requiring or requesting defendant to make such demonstration, the conditions of the contract requiring a demonstration by defendant were waived.

SPECIFIC PERFORMANCE OF UNACCEPTED CONTRACT.

2. Where a contract obligated defendant to execute to plaintiff a lease, with an option to purchase, and plaintiff refused to accept the lease for no fault of defendants, plaintiff could not maintain a suit for damages or specific performance based on the option clause which would have been in the lease if accepted.

RIGHTS OF PARTIES ON FAILURE OF VENDOR TO PROVIDE GOOD TITLE.

3. Where the vendee in an executory contract for the purchase of real estate takes possession, and the title of the vendor fails, or he is unable to make conveyance as stipulated, the purchaser's remedy is either to rescind the contract, and to restore or offer to restore possession, in which case he may recover the purchase money and interest, or to retain possession under the contract, pay the purchase price, and accept such title as the vendor may be able to give. He cannot retain both the land and the purchase money until a perfect title is offered to him.

From Columbia: THOMAS A. MCBRIDE, Judge.

Statement by MR. JUSTICE BEAN.

This is an action by James Muckle and another against George F. Livesley, in which said Livesley filed a cross-bill. On July 3, 1902, the defendants Muckle, being the owners of certain sawmill property in St. Helens, leased the same to Smith & Murray for a year, upon certain terms and conditions, with the provision that, if they desired at any time during the continuance of the lease, the lessors would sell and convey the property to them by a good and sufficient deed, conveying the title, excepting one lot which was to be conveyed by a quitclaim deed, upon the payment of \$3,133.33 in cash; the balance of the purchase price, of \$6,666.67, to be secured by a first mortgage on the property. Smith & Murray immediately went into possession of the mill, and soon thereafter organized the St. Helens Lumber Co., a corporation, to take over the lease and their rights thereunder. The mill company operated the mill until December, when it became financially embarrassed, and a receiver was appointed by the state court to take possession of its assets. Among its debts was one to the defendants for \$2,000, money borrowed. About this time plaintiff, through some arrangement, the details of which are immaterial herein, with

Smith & Murray and the lumber company, undertook to finance the enterprise and take care of the debts of the lumber company. He applied to the defendants for a confirmation of the lease of the property, but they declined to negotiate with him until they had recovered possession, claiming that the conditions of the lease to Smith & Murray had been broken and the lease forfeited, and that they were entitled to possession of the property. Upon an application made by them to the court appointing the receiver, setting up the alleged forfeiture, an order was made requiring him to deliver possession of the mill to them, which was done accordingly. They thereupon entered into the following agreement with plaintiff.

"Memorandum. In consideration of the sum of \$2,043.66, to us paid by G. F. Livesley, we hereby agree to and with the said Livesley that we will start the mill mentioned in the lease made July 3, 1902, by us to Herman Smith and George P. Murray, and will demonstrate that the same can be successfully run, making good lumber; and that when this is done we will execute to said Livesley a lease conditioned in all respects as to the lease to said Smith and Murray is, but to end at the same time said lease ends.

"Provided, that in case any litigation shall grow out of the said lease, said Livesley shall defend such litigation, and our lease to him must be subject to such orders as shall be made therein; and in case we fail to demonstrate the fact that said mill can be successfully run and cut good lumber, we will return to said Livesley the said sum of money so paid by him, and negotiations between us will be all off. The expense of starting said mill, both for material and wages, shall be paid by said Livesley, who shall own the output thereof."

Upon the making of this agreement, plaintiff entered into possession of the mill, and proceeded to operate it without requesting or demanding of the defendants that they comply with their stipulation to demonstrate that it could be run successfully and make good lumber; and thereafter the defendants offered to execute to him a lease as agreed upon, but he refused to accept it until certain pending bankruptcy proceedings against the mill company had been disposed of. About the time the term specified in the lease from the defendants to Smith & Murray was to expire, the plaintiff indicated a willingness to purchase the property on the terms stipulated in such lease, and

the defendants, being anxious to sell, prepared a deed for delivery to the plaintiff; but he was advised by his counsel that defendants could not convey a merchantable title, and so refused to accept the deed or pay the purchase money. He, however, remained in possession of the property, and did not surrender or offer to surrender it to defendants. They thereupon commenced an action at law to recover possession, in which the plaintiff, by way of cross-bill, set up the facts detailed, demanding affirmative relief. Upon the trial the court decreed that, upon the payment by plaintiff of \$10,000 within 30 days, the defendants should convey the property to him, but, in case he failed to make the payment, defendants should have restitution of the property, and damages for the withholding of the same. The plaintiff declined to make the payment, and expressly waived the right to purchase the property, and thereupon decree of restitution and for \$1,425 damages was entered in favor of the defendants. From this decree the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Samuel Hiram Gruber* and *William Ellis Stowe*, with an oral argument by *Mr. Gruber*.

For respondent there was a brief over the names of *Julius Caesar Moreland* and *Lionel Richard Webster*, with an oral argument by *Mr. Moreland*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. The cross-bill filed by the plaintiff in the action at law brought against him by the defendants to recover possession of the property in question, and the case made for him on this appeal, proceed on the theory that he is entitled to all the rights and remedies against the defendants that would have accrued to him, had the lease mentioned and referred to in the memorandum agreement between him and the defendants on January 13th been in fact executed. His position is that he is entitled either to a deed conveying to him a merchantable title of the property, or to damages for a breach of the contract to convey. The vice of this position lies in the fact that the defendants

never agreed to sell and convey the property to him. The only contract they had with him was to "demonstrate" that the mill could "be successfully run, making good lumber"; and if they did so execute to him a lease conditioned as the one formerly given by them to Smith & Murray, except that it should end on July 3, 1903, and should be subject to such orders as should be made in any litigation growing out of the former lease, and if they failed to demonstrate that the mill could be successfully run, making good lumber, they were to return the money paid by him, and all negotiations between them were to be off. The pleadings expressly admit that, immediately upon the making of the contract between the plaintiff and the defendants, the plaintiff entered into possession of the mill property, and demonstrated himself that it could be successfully run and would make good lumber, and thereafter continued in possession, without requiring or requesting the defendants to make such demonstration, and so waived the conditions of the agreement in that regard.

2. It is in proof that after they had thus shown that the mill could be successfully run, making good lumber, the defendants offered and were ready and willing to make the lease as agreed upon, but the plaintiff would not accept it, because of some litigation in the bankruptcy court to which the defendants were not parties, and for which they were not responsible. The plaintiff having refused to accept the lease, it is difficult to understand how he can claim any rights by virtue of some provision which would have been in the lease if it had been made and accepted. For this reason, we are of the opinion that plaintiff is not entitled to any relief in this suit.

3. If, however, the lease had been in fact executed and delivered, the plaintiff could not have remained in possession of the property, and refused to pay the purchase price. Where the vendee under an executory contract for the purchase of real estate takes possession, and the title of the vendor fails, or he is unable to make conveyance as stipulated, the remedy of the purchaser is either to rescind the contract and restore or offer to restore possession, in which case he may recover the purchase money and interest, or retain possession under the contract, and

pay the purchase price, accepting such title as the vendor may be able to give. He cannot retain both the land and the purchase money until a perfect title shall be offered to him: *Gates v. McLean*, 70 Cal. 42 (11 Pac. 489); *Rhorer v. Bila*, 83 Cal. 51 (23 Pac. 274); *Worley v. Nethercott*, 91 Cal. 512 (27 Pac. 767, 25 Am. St. Rep. 209).

It follows that the decree of the court below must be affirmed, and it is so ordered. **AFFIRMED.**

Argued 6 April, decided 15 May, rehearing denied 17 July, 1905.

BEADLE v. PAINE.

80 Pac. 903.

SCOPE OF CROSS-EXAMINATION.

1. In an action against a physician for injuries to plaintiff, owing to negligent treatment of his fractured arm, a physician having been asked on his examination in chief if there was not an X-ray machine in the city where plaintiff was treated, and he having answered that a certain physician had one, it was not improper cross-examination to inquire whether it was usual in that locality for surgeons to have such appliances.

PHYSICIANS—MALPRACTICE—TESTING KNOWLEDGE OF WITNESS.

2. An expert witness having testified to some general surgical propositions, and that a specified treatise was a standard authority, it was not improper cross-examination to ask the witness if that work did not contain statements contradictory of his testimony.

CROSS-EXAMINATION COVERING QUESTIONS ALREADY ANSWERED.

3. Where questions put to witnesses on cross-examination were contained in former questions, to which no objections were made, it was within the discretion of the court to allow the questions to be answered or not.

FORM OF BILL OF EXCEPTIONS—ATTACHING TRANSCRIPT OF EVIDENCE.

4. A bill of exceptions should show the matters objected and excepted to, with so much explanatory statement as may be necessary to show the bearing of the ruling, but the testimony at length should not be attached to the bill of exceptions or referred to in connection with rulings on the introduction of evidence.

INSTRUCTIONS—REPEATING QUALIFYING PHRASES.

5. Where proper instructions have been given in reference to a particular class of persons or with certain qualifying expressions, it will not be necessary to repeat them with every paragraph. For instance, where, in an action for malpractice of surgery, the court gave instructions as to the degree of skill that should be observed by persons holding themselves out as specialists in the practice of surgery, it was not necessary to make reference to specialists in giving an instruction to the effect that it was not negligence for defendant not to have an X-ray machine unless it was usually employed by physicians and surgeons in that locality.

PHYSICIANS AND SURGEONS—INSTRUCTION AS TO DEGREE OF SKILL REQUIRED OF SPECIALISTS.

6. The court instructed that a physician or surgeon making a specialty of the practice of surgery is not bound to use any greater skill, care or diligence in the treatment of the case than a specialist in the same general locality in which such physician or surgeon resides and practices his profession. *Held*, that while the instruction might properly have called for such skill, care and diligence as were observed in like or similar localities, there was no error in omitting to do so, the court having in previous instructions explicitly informed the jury that the degree of skill required

would be that possessed by the average members of the profession practicing as specialists in similar localities, regard being had to the advanced state of medical science.

SURGEONS—MALPRACTICE—NEGLIGENCE OF PATIENT.

7. In an action for malpractice of surgery, where the defendant is charged with negligence or nonobservance of proper care, or want of skill, it is a good defense that the patient was negligent at the time, which conducted or contributed to produce the injury complained of, but it will not suffice to defeat the action that the injured party was subsequently negligent, and thereby conducted to the aggravation of the injury primarily sustained, though this later negligence of the patient may be shown in mitigation of damages.

SURGEONS—INSTRUCTIONS AS TO CARE BY PATIENT.

8. In an action for injuries to plaintiff owing to the negligence of defendant in treating plaintiff's fractured arm, the court instructed that if plaintiff, after having been treated for some time by defendant, was told by defendant to return for further treatment, and was instructed in the proper care and use of his arm, and he failed to return for treatment and used his arm in a different manner, the jury might take such facts into consideration in determining whether the plaintiff was negligent. *Held*, that the instruction was not erroneous.

REQUESTS FOR INSTRUCTIONS.

9. Instructions particularly desired should be presented to the court, and it is not the duty of the supreme court to survey the entire testimony in order to determine what instructions should have been given.

From Lane: JAMES W. HAMILTON, Judge.

Action in tort by Herbert Beadle against Paine & Kuykendall, surgeons, resulting in a judgment for defendants, from which this appeal is taken.

AFFIRMED.

For appellant there was a brief over the names of *Louis E. Bean* and *John Monroe Williams*, with an oral argument by *Mr. Williams*.

For respondents there was a brief over the names of *Edwin O. Potter* and *Woodcock & Harris*, with an oral argument by *Mr. Potter* and *Mr. Absalom Cornelius Woodcock*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is an action to recover for injuries alleged to have been sustained by plaintiff in the negligent treatment of his arm by the defendants; the same having been broken, dislocated, and bruised. Numerous errors are assigned in the record, and such as are possessed of obvious merit will be examined.

1. The question propounded to Dr. T. W. Harris on cross-examination were not improper. He was asked on his examination in chief if there was not an X-ray machine in Eugene, to which he answered that Dr. Prentice had one. To push the inquiry on cross-examination to the extent of ascertaining

whether it was usual in that locality for every surgeon to have a machine of the kind, or whether the one possessed by Dr. Prentice was the only one to be found in that locality, was not without the scope of reasonable inquiry. It was germane to the subject entered upon by plaintiff, and altogether relevant.

The answer of Dr. J. W. Harris was stricken out because not responsive to the question. In this there was no error. If the plaintiff had desired the information thus elicited, he could have had it, no doubt, by directing a proper question to that purpose.

The question propounded to Dr. Van Valzah was on redirect examination, and, as it seems to have been conceded that there could have been no union of the fractured bone unless the ends were in contact, the ruling of the court did the plaintiff no harm.

2. Dr. Hosmer was asked the following question, to which an exception was saved:

"I will ask you if it isn't stated in that work [the International Cyclopedia of Surgery], page 43, volume 4, that cases occur of persons—of a young man of fine, healthy condition—where the fracture remains ununited to the end of the fifth or sixth month, and that, although the bones are kept in apposition, and in every other respect the treatment was correct?"

The witness had previously testified that, in a healthy person, union would always take place, and further that he had read the International Cyclopedia somewhat, and pronounced the work standard. The purpose of the question was to test his knowledge upon the subject and he answered:

"That is possible that this book says this, but I think that the pathological condition from what I have read and heard—that there must be something lacking in the system, in the blood, that is not discovered."

It is difficult to see wherein the answer was injurious to plaintiff, or that the inquiry made about the book tended to weaken the witness's testimony in the least. But, however this may be, counsel did not overstep the rule applicable. The witness was testifying as an expert, and, his attention being called to the work, he showed some familiarity with it, whereupon he was asked if it did not state so and so touching the subject in hand. The book was not offered, nor does it appear to have been read from, and the sole purpose of the inquiry was to test

the witness's knowledge of the subject. We think it was proper. In *Connecticut Mut. Life Ins. Co. v. Ellis*, 89 Ill. 516, 519, the court say: "The witness had given the symptoms of the disease with which the assured was affected, and pronounced it delirium tremens, and, as a matter of right, plaintiff might test the knowledge possessed by the witness of that disease by any fair means that promised to elicit the truth. It will be conceded it might be done by asking proper and pertinent questions, and what possible difference could it make whether the questions were read out of a medical book, or framed by counsel for that purpose?" *City of Bloomington v. Shrock*, 110 Ill. 219 (51 Am. Rep. 679), cited by counsel for plaintiff, is clearly distinguishable from the case at bar.

The question put to the witness Sadie Perkins was properly denied. She was neither a surgeon nor a physician, and was not called as an expert: *O'Hara v. Wells*, 14 Neb. 403, 408 (15 N. W. 722).

The question asked Dr. Kuykendall touching the care and skill observed by defendants in the treatment of plaintiff's arm, as compared with the ordinary skill and diligence used by physicians and surgeons in such cases, might not have been technically suitable, in view of the fact that defendants were holding themselves out as specialists in that line, yet the answers elicited show that they gave to the treatment the best skill, and could not possibly have been hurtful to the plaintiff.

3. The substance of the hypothetical questions put to Drs. Day and Cheshire on cross-examination, and not allowed, were contained in former questions to which no objections were made, and for that reason it was within the discretion of the trial court to allow them to be answered or not.

4. The questions propounded to Dr. Houck were not, so far as we can discover from the bill of exceptions, properly in rebuttal. In this connection it is pertinent that we should indicate our disapproval of the manner in which the bill of exceptions was gotten up. The testimony in the case is attached thereto, marked "Exhibit A," and made a part of it, and, in stating the errors relied on, the court is referred to the testimony to determine whether they have a basis in fact. The alleged error

under discussion is a representative type, as it pertains to the manner of statement. We quote from the bill of exceptions (page 22):

"Dr. Houck, being recalled on behalf of the plaintiff in rebuttal, was asked the following questions:

12 Q. (page 156) 'I will ask you to state if there is a small fracture. * * I will ask you to state, as a matter of fact, from your examination by looking at the arm, visual sight, and by the aid of the X-ray whether the humerus was fractured?' The question was objected to by defendants as not rebuttal testimony, which objection was sustained by the court, and to which ruling the plaintiff excepted, which exception was allowed by the court.

13 Q. 'I will ask you to state if a fracture of that kind, if it existed, would show in the radiograph?' To which question defendants objected as case in chief, not rebuttal, which objection was sustained, to which ruling of the court plaintiff excepted, which exception was allowed by the court. Permission was again asked (page 159) to re-ask the last question above, and the same objection interposed, with the same ruling and exception."

This is all there is to indicate whether there was error or not. There is no grouping of any facts pertinent to show the bearing of the questions ruled upon by the trial court, and this court's attention is simply directed to the testimony to determine whether there is such a state of facts as will sustain or overturn the ruling. This practice has been repeatedly disapproved: *O'Connor v. Van Hoy*, 29 Or. 505 (45 Pac. 762); *MacMahon v. Duffy*, 36 Or. 150 (59 Pac. 184); *Nosler v. Coos Bay R. Co.* 40 Or. 305 (63 Pac. 1050, 64 Pac. 855).

5. We come now to the instructions to which exceptions were saved. The first we are to notice, designated as No. 3 in the bill of exceptions, reads as follows:

"I instruct you that it was not negligence of the defendants, or lack of proper skill on their part, for them not to have an X-ray machine, or for them not to use the same in the treatment of plaintiff's arm, unless such machine was usually employed by physicians and surgeons in the same general locality in which the defendants were practicing their profession, or in similar localities."

The criticism of this instruction is twofold: First, that it has no application to specialists, such as defendants were holding themselves out to be, in the practice of surgery; and, second, that the defendants were in doubt as to the exact nature of the injury sustained, and the proper method of adjusting the arm, and, being in doubt, they should have resolved it by calling into requisition the X-ray machine that was accessible to them. To be understood, this especial instruction should be read in connection with others that preceded it. These are as follows:

"The degree of care and skill and diligence required of physicians and surgeons is that care, skill, and diligence which is ordinarily possessed by the average of the members of the profession in good standing in similar localities; regard being had to the state of medical science at that time.

"As specialists of any department, the rule would be that specialists in the practice of surgery are bound to bring to the discharge of their duty in the treatment of plaintiff's arm, as such specialists, that degree of care, skill, and knowledge which is ordinarily possessed by practitioners devoting special attention and study to the same branch in similar localities, having regard to the present state of medical science.

"The care and skill that a surgeon would use in the practice of his profession should be proportionate to the character of the injury he treats, within the limits of ordinary skill and knowledge, and in the light of the advanced state of the science at the time of treatment; and if, under the evidence in this case, under the rule of law as I have given the same to you, it should appear by the preponderance of the evidence that the defendants, undertaking the care and treatment of plaintiff's arm, did not give to him the ordinary skill and knowledge which is possessed by the average of the profession making a specialty of surgery, then the plaintiff would be entitled to recover some damages at your hands, in case you should find that he had suffered any damages traceable to the fact of the neglect or unskillful treatment on the part of the defendants in the treatment of his arm."

Now, it will readily be seen that the court gave proper instructions, or at least such as were deemed proper by the plaintiff—no objection being saved thereto—as to the degree of skill that should be observed by persons holding themselves out as specialists in the practice of surgery, and it was unnecessary for it to repeat them in every instruction bearing upon the case. As to the second ground of criticism, it does not adequately appear

from the bill of exceptions that the defendants or Dr. Kuykendall, who adjusted the arm, were in doubt, as alleged.

6. Exception is taken to another, denominated the fourth, instruction, which reads as follows:

"A physician or surgeon making a specialty of the practice of surgery is not bound to use any greater skill, care, or diligence in the treatment of the case than a specialist in the same general locality in which said physician or surgeon resides and practices his profession."

The criticism here is that the skill, care and diligence required of defendants were such as are observed in like or similar localities. The qualification might have been made with propriety: *Whitesell v. Hill*, 101 Iowa, 629 (70 N. W. 750, 37 L. R. A. 830); *Pelky v. Palmer*, 109 Mich. 561 (67 N. W. 561); *Gramm v. Boener*, 56 Ind. 497; *McCracken v. Smathers*, 122 N. C. 799 (29 S. E. 354). The court, had, however in previous instructions so explicitly informed the jury that the degree of skill required would be such as was possessed by the average members of the profession practicing as specialists in similar localities, regard being had to the advanced state of medical science at the time, that they could hardly have been misled by the instruction in question. Indeed, it should be read with the preceding instructions, and when so read there was no error.

7. The next exception is to instruction numbered 5, as designated in the bill of exceptions, which reads as follows:

"Even though no instructions were given to the patient, he is required to exercise such ordinary prudence as would be expected of a person situated in his condition, and the failure on his part to exercise this prudence would prevent recovery."

This is a mere excerpt, and, to be properly interpreted, should be read with other directions of the court in charging the jury, both preceding and succeeding it. Immediately preceding is the following:

"There is something in the complaint in regard to the plaintiff having observed the instructions given by the defendants. He alleges that he did follow the instructions, and that his injury was without contributory negligence on his part. There is some evidence in this case tending to show that the arm appears as it did when the plaintiff left the hospital, while the defendants claim that the arm presents an altogether different

appearance. This is a matter for you to determine in the case, but the rule of law is that even though"—continuing in the language above set out, following which is this:

"If you find that the injury of which plaintiff complains was caused wholly or in part by his own acts of negligence, then he cannot recover. It is the duty of the patient to observe and follow the reasonable directions of his physician and surgeon. If the patient, after having been treated for some time by the defendants, upon going away from the place where the treatment had been given, was instructed by the defendants to return for further treatment, and was instructed by them in the proper care and use of his arm, and the plaintiff failed or neglected to return for treatment, and used his arm in a different manner than that directed by the defendants, these are facts for you to take into consideration, with the other facts of the case, in determining whether the plaintiff was not negligent."

The latter part of the instructions, commencing with the words "it is the duty of the patient," etc., is also excepted to. The basis of the exceptions to both these excerpts is that plaintiff's subsequent negligence, not contributing to produce the injury complained of, is not a ground of defense to the negligence of the defendants in the first instance, and at most it could only serve to mitigate the damages where its tendency was to enhance them. It is a good defense in an action for malpractice, where the physician or surgeon is charged with negligence or the nonobservance of proper care or the want of skill in performing the services undertaken, that the patient was negligent at the time, which conduced or contributed to produce the injury complained of; but it will not suffice to defeat the action that the injured party was subsequently negligent, and thereby conduced to the aggravation of the injury primarily sustained at the hands of the physician or surgeon, and such conduct on the part of the patient is pertinent to be shown in mitigation of damages only where enhanced thereby, but not to relieve against the primary liability: *Cooley*, Torts, 683; *Sanderson v. Holland*, 39 Mo. App. 233; *Wilmot v. Howard*, 39 Vt. 447 (94 Am. Dec. 338); *McCracken v. Smathers*, 122 N. C. 799 (29 S. E. 354); *Hubbard v. Thompson*, 109 Mass. 286.

8. Now, to come again to the instructions: They relate to the patient's observance of the directions given him by the

defendants. Of course, if he refused or failed to follow them, he could not complain if his negligence in that respect conduced to the injury. That is to say, if it prevented or retarded union or healing of the parts, for the directions were a part of the treatment prescribed, and a want of observance of them on the patient's part would defeat the action. It was in this connection that the court charged that the patient was bound to the observance of ordinary prudence, even without instructions from the surgeon. The want of ordinary prudence would be tantamount to negligence, and, if it was a contributing cause to the injury, the case would be within the rule. This much is conceded, for the court told the jury that if they should find that the injury of which the plaintiff complains was caused wholly or in part by plaintiff's own acts or negligence, he cannot recover, to which no exceptions were saved. Plaintiff does except, however, to what follows, but by reading the whole together, the purpose of the instructions is apparent. They were intended to advise the jury as to the effect of a nonobservance of the directions of the defendants in the treatment of his arm or of ordinary care and prudence, which was enjoined upon him without their directions, and there was no attempt to advise the jury as to any conduct of the plaintiff that might operate in aggravation of the injury of which he complains.

9. The court was not requested so to instruct, and we are not advised by the bill of exceptions that the question was in the case. There are no pertinent or sufficient facts set out in it to show the relevancy of such an instruction, and it is not for this court to survey the entire testimony to determine whether one should have been given.

Having examined the various assignments, and finding no error, the judgment of the circuit court is affirmed.

AFFIRMED.

MR. JUSTICE BEAN took no part in this decision.

Argued 5 April, decided 15 May, 1905.

STATE v. NEASE.

80 Pac. 897.

POOL ROOM AS PUBLIC NUISANCE—GAMBLING.

1. A pool room in which persons daily congregate to bet upon horse races reported to the proprietor by telegraph, is a gaming house, punishable as a nuisance at common law.

POWER OF CITY TO LICENSE POOL ROOM—CONSTRUCTION OF CHARTER.

2. A city which by its charter is authorized to prevent and suppress gaming and gambling houses is not authorized to make such places lawful by licensing them.

STATUTES—MAINTAINING POOL ROOM—NUISANCE.

3. Under B. & C. Comp. § 1930, providing for the punishment of persons who willfully and wrongfully commit any act which grossly disturbs the public peace or health, or which openly outrages the public decency, and is injurious to the public morals, it is not necessary, to constitute the offense, that there should be an actual breach or disturbance of the peace, or actual or threatened violence, but any immoral or criminal act which disturbs the quiet and tranquillity of society, to the injury of public order and decorum, or disturbs or threatens the public peace, and which would constitute a nuisance at common law, is within the statute, as, for example, maintaining a gambling house or pool room.

STATUTES—CONSTRUCTION OF AS AFFECTED BY NONUSER.

4. The fact that a penal statute has been on the statute books for over forty years, and has not been applied in a particular manner, does not preclude the application and enforcement of the statute in that manner if it may properly be so applied and enforced.

From Multnomah: ARTHUR L. FRAZER, Judge.

M. G. Nease appeals from a conviction of committing an act grossly disturbing the public peace by maintaining a pool room in the City of Portland.

AFFIRMED.

For appellant there was an oral argument by *Mr. Edward B. Watson* and *Mr. John M. Gearin*, with a brief over the names of *Watson & Beckman*, *Dolph*, *Mallory*, *Simon & Gearin*, and *William P. Lord*, to this effect.

I. There are no common law offenses in this State, and no crimes except those named in the statutes: *State v. Vowels*, 4 Or. 324, 326; *State v. Gaunt*, 13 Or. 115 (9 Pac. 55); 6 Am. & Eng. Enc. Law (2 ed.), 290.

II. The prosecution seeks to make out its case by construing Section 1930 of B. & C. Comp. into an adoption or reenactment of the common law on the subject of indictable nuisance. This section does not make any reference in terms to the common law, nor employ any word descriptive of an indictable nuisance at common law, nor specify the elements of such offense at common law, and it is impossible to hold that the legislature, in

enacting the same, intended to restore the common law, without passing clear beyond any literal, or even probable, meaning of the words it has employed, which is not permissible under any rule for the construction of penal statutes.

The established rule does not allow the extension of words beyond their fair and reasonable meaning, nor permit any case to be brought within the statute "unless completely within its words": Bishop, Stat. Cr. (2 ed.), §§ 216, 220; *State v. Mann*, 2 Or. 238, 241.

The intention of the legislature to adopt or re-enact any provision of the common law against criminal offenses must be expressly declared in terms, or clearly implied from the employment of words having a definite and settled meaning in the common law; otherwise the statute can have no force or operation beyond the literal interpretation of its own terms. Criminal offenses cannot be created by construction: Sutherland, Stat. Const. §§ 253, 291, 350; Bishop, Stat. Cr. (2 ed.), § 220.

III. A "gross" disturbance of the public peace involves not only an actual breach of peace, but the commission thereof with more than an ordinary degree of force or violence, or under circumstances more than ordinarily calculated to produce fright or alarm: Anderson, Law Dic. 761; 4 Am. & Eng. Enc. Law (2 ed.), 902; 2 Wharton, Crim. Law, § 1555; 1 Bishop, Crim. Law, § 560; *State v. Warner*, 34 Conn. 276; *Ware v. Branch*, 75 Mich. 493 (42 N. W. 997, 1000); *Peabody v. Peabody*, 104 Mass. 195, 197.

Actual disturbance of the public peace was not an element of criminal nuisance at common law (2 Wharton, Crim. Law, § 1465; *People v. Sergeant*, 8 Cow. 139, 141; *State v. Layman*, 5 Har. 510); and the "act which openly outrages public decency and is injurious to public morals" has uniformly been construed to include only displays of the naked person, the publication, sale or exhibition of obscene books and prints, and the like, containing the element of obscenity: Anderson, Law Dic. 534; *McJunkins v. State*, 10 Ind. 145; *Knowles v. State*, 3 Day, 103; *State v. Rose*, 32 Mo. 560; *Gilmore v. State*, 118 Ga. 299 (45 S. E. 787).

IV. A licensed business cannot be adjudged a nuisance, even if it is in its nature against public policy or against the highest standard of public morality: *State v. Mosly*, 14 Ala. 390; *State v. Alaire*, 14 Fla. 435; *State v. Jones*, 26 Ala. 155; *State v. Hawkins*, 33 Ala. 433; *Hinchman v. Patterson*, 17 N. J. Eq. 77; *Davis v. Mayor*, 14 N. Y. 506 (67 Am. Dec. 186); *State v. Overby*, 18 Fla. 178; *State v. Stearne*, 21 Tex. 695; *State v. Houghton*, 41 Tex. 136; *Transportation Co. v. Chicago*, 99 U. S. 635; *Rutherford v. State*, 45 S. W. 579.

Where the offense charged belongs to criminal nuisances, as understood at common law, we have no such section or provisions. The absence of them is what reduces the State to the necessity of trying to read into Section 1930 that the offenses it enumerates are common nuisances, as defined at common law, to sustain the indictment, charging the defendant with maintaining a public nuisance. As this section has no common law word, or definition, no description or specification of a common law offense, no words indicating an intention to adopt the common law, as to indictable nuisances, it cannot have read into it by construction a common law offense, or other offense than its language describes in its ordinary meaning. Upon the wording of the section it is not possible to predicate a common law nuisance; that can only be done, if it can be done at all, by the legislature amending the section declaring the offenses to be public nuisances. We feel that we are entitled to a reversal on the broad ground that our Section 1930, of B. & C. Comp. does not, either in terms or by description of the offense, adopt or re-enact the common law against criminal nuisances, and that the words of the statute cannot be extended by construction so as to include it.

For the State there was an oral argument by *Mr. Andrew M. Crawford*, Attorney General, and *Mr. Henry E. McGinn*, with a brief over the names of *Mr. Crawford*, *Mr. John Manning*, District Attorney, and *Mr. McGinn*, to this effect.

1. Horse racing is a game within the meaning of Section 1944, B. & C. Comp., where a contrivance, such as a blackboard, or a "Paris Mutual" or "French Pool" machine is employed to enable one to bet more intelligently or safely, and lessen the

chances of disaster to himself. A device is included in the expression "any other device" of Section 1944: 14 Am. & Eng. Enc. Law (2 ed.), 682; *Swigart v. People*, 154 Ill. 284, 290 (40 N. E. 432); *Commonwealth v. Simonds*, 79 Ky. 618; *People v. Weithoff*, 51 Mich. 203 (47 Am. Rep. 557, 16 N. W. 442); *Miller v. United States*, 6 App. Cas. D. C. 6; *People v. Weithoff*, 93 Mich. 631 (32 Am. St. Rep. 532, 53 N. W. 784); *Tallett v. Thomas*, Law R. 6 Q. B. 514, 521. Opposed is *State v. Shaw*, 39 Minn. 153, 154, criticised in 14 Am. & Eng. Enc. Law (2 ed.), 709.

2. Section 1930, B. & C. Comp., is a re-enactment of the common law on the subject of "public nuisance" in the particulars specified, to-wit, public health, public peace, and public morals. Whatever therefore could be punished at common law, because of its tendency to grossly disturb the public peace, or the public health, or openly outrage the public decency and to injure public morals can be punished under our statute: *State v. Bertheol*, 6 Blackf. 474 (39 Am. Rep. 442); *Burk v. State*, 27 Ind. 430; *State v. Taylor*, 29 Ind. 517; *State v. Berdetta*, 73 Ind. 185 (38 Am. Rep. 117); *Western Union Tel. Co. v. Scircle*, 103 Ind. 227 (2 N. E. 604); *State v. Friend*, 47 Minn. 449 (50 N. W. 692); *United States v. Jones*, 3 Wash. (C. C.), 209; Sutherland, Stat. Const. §§ 247, 253; Endlich, Interp. Stat. §§ 3 and 75.

3. To learn the meaning of such phrases as "grossly disturbs the public peace" or "openly outrages the public decency and is injurious to public morals" one turns to the common law of nuisance, and there finds that from time immemorial the keeper of a gaming house was guilty of maintaining a public nuisance and was punishable as such, though what was carried on in the gaming house may in itself be innocent and not prohibited by law, and the reasons assigned by the common law judges and writers were that the keeping of such places tended to disturb the public peace, to outrage decency and to injure public morals: 1 Hawkins, Pleas of the Crown (Curwood's ed.), 693, §§ 6 and 7; 1 Bishop, New Crim. Law, § 1135; 14 Am. & Eng. Enc. Law (2 ed.), 697; *Thrower v. State*, 117 Ga. 753 (45 S. E. 126); *Jenks v. Turpin*, 13 Q. B. D. 505; *Thatcher v. State*, 48 Ark.

60 (2 S. W. 343); *Vanderworker v. State*, 13 Ark. 700; *King v. People*, 83 N. Y. 587; *State v. Mosby*, 53 Mo. App. 571; *Lord v. State*, 16 N. H. 325, 330 (41 Am. Dec. 729); *State v. Black*, 94 N. C. 812; *State v. Bertheol*, 6 Blackf. 474 (39 Am. Rep. 442); *State v. Haines*, 30 Me. 65; *People v. Jackson*, 3 Denio, 101; *State v. Layman*, 5 Har. (Del.), 510; *State v. Williams*, 30 N. J. L. 104; *Commonwealth v. Cobb*, 120 Mass. 356; *Cheek v. Commonwealth*, 79 Ky. 359; *Bohlinger v. Commonwealth*, 98 Ky. 574; *Commonwealth v. Cheek*, 100 Ky. 1.

4. The city has no authority to license pool rooms, its power is limited to preventing and suppressing gaming and gambling houses: *Odell v. City of Atlanta*, 97 Ga. 670; *Schuster v. State*, 48 Ala. 199; *State v. Caldwell*, 3 La. Ann. 435; 14 Am. & Eng. Enc. Law (2 ed.), 696, note 7.

The fact that the morality clause of our statute has been most frequently considered in cases where offenses directed against modesty and chastity were under consideration seems to have created the impression that to punish such offenses was the only office of that clause; but the impression is a very erroneous one. "Chastity is not the only form of morality protected by the common law," says Bishop. The erection of mountebank's stages, gaming, and other disorderly houses, cock fighting, drunkenness and sepulture are instances cited to show that the punishment of offenses against modesty and chastity is not the only purpose of the common law: Bishop, New Crim. Law, §§ 504, 505, 506; *Kanavan's Case*, 1 Greenleaf, 226.

Our conclusion, then, is that whatever could be punished at common law, because of its tendency to disturb the public peace, or because of its tendency to injure the public morals, may now be punished under the two clauses of Section 1930 of B. & C. Comp., which we have considered in this brief, unless it be that the legislative assembly, by some specific enactment on a subject which was formerly covered by Section 1930, B. & C. Comp., has by a subsequent statute shown an intention to so completely cover the subject treated as to leave no doubt that it intended to repeal pro tanto the right to punish under Section 1930. It will not be claimed that there is any specific law in Oregon punishing the keeper of either a gaming or a gambling

house, the legislature has legislated against games, but not against keepers of gaming houses. It must follow, therefore, that the keeper of a common gaming house is indictable as the keeper of a common nuisance under Section 1930, B. & C. Comp., precisely as he was at common law.

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant was indicted for willfully committing an act which grossly disturbs the public peace, openly outrages the public decency, and is injurious to the public morals, in that he, viz:

"On the 20th day of October, A. D. 1904, and thence continuously until the 1st day of November, 1904, * * did then and there, for gain, habitually sell pools upon horse races, and habitually procure idle and evil-disposed persons to come to his house to buy pools and to bet upon horse races, to the common nuisance and annoyance of all good citizens," etc.

He had previously obtained from the City of Portland a license to conduct a pool room. The trial court held that the license was no protection, and refused to direct an acquittal of the defendant. He was consequently convicted and appeals.

1. The evidence shows that he was the keeper and proprietor of what is called a "turf exchange," or pool room, on one of the principal thoroughfares in the city, at which persons daily congregated for the purpose of betting upon horse races run in other states, and reported to him by telegraph. The odds on every horse in any race of importance about to be run, as made at the race course, were reported to the defendant before the race, and posted for the information of the public on a blackboard in the room used by him. A person desiring to bet would select a horse, pay the amount of his bet according to the odds appearing on the blackboard, and receive from the defendant a ticket showing the sum to which he would be entitled in case the horse selected by him won. As soon as the race was run the result would be immediately telegraphed to the defendant, and he would pay the amount coming to the holders of tickets on the winning horse, less a certain per cent as commission. That such a house is a gaming or gambling house, and punishable as a nuisance at common law, whether betting on a horse

race is a crime or not, has so often and uniformly been held by the courts that it is no longer open to discussion. There is no dissent in the adjudged cases, and it is unnecessary to do more than cite the authorities: *McBride v. State*, 39 Fla. 442 (22 South. 711); *Thrower v. State*, 117 Ga. 753 (45 S. E. 126); *Swigart v. People*, 154 Ill. 284 (40 N. E. 432); *Swigart v. People*, 50 Ill. App. 181; *Cheek v. Commonwealth*, 79 Ky. 359; *People v. Weithoff*, 51 Mich. 203 (16 N. W. 442, 47 Am. Rep. 557); *People v. Weithoff*, 93 Mich. 631 (53 N. W. 784, 32 Am. St. Rep. 532); *McClellan v. State*, 49 N. J. Law, 471 (9 Atl. 681); *Miller v. United States*, 6 App. D. C. 6.

2. By its charter the City of Portland is authorized to "prevent and suppress gaming and gambling houses," but not to make such places lawful by licensing them: *Schuster v. State*, 48 Ala. 199.

3. Nor, as we understand it, are these positions seriously controverted by the defendant, but his contention is that there is no law in this State for the punishment of the keeper of a common gaming house; that, although the statute makes certain kinds of gambling a crime, and punishable as such (B. & C. Comp. § 1944), and provides for the punishment of the owner of a building who suffers or permits gambling to be carried on therein (B. & C. Comp. § 1949), it does not make the keeping of a gambling house unlawful, or provide for the punishment of a keeper or proprietor thereof. Now, there is no statute providing specifically for such an offense, nor have we any common law offenses, as such: *State v. Vowels*, 4 Or. 324; *State v. Gaunt*, 13 Or. 115 (9 Pac. 55). But Section 1930 provides "If any person shall willfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to the public morals, such person, if no punishment is expressly prescribed therefor by this Code, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than six months, or by fine not less than fifty nor more than two hundred dollars." This section is a part of the original Criminal Code reported to and adopted by the legislature in October,

1864, and was probably taken bodily from the draft of a Penal Code for the State of New York prepared by David Dudley Field and his associates in April of that year: Proposed Penal Code, § 736. It has been generally known as the "Nuisance Statute," and prosecutions and convictions for maintaining public nuisances have been had thereunder: *State v. Bergman*, 6 Or 341. It was evidently intended to cover such offenses against the public peace, the public health, common decency and the public morals, and such as grossly injure the person or property of another, which are not otherwise made punishable by the Code. This is indicated quite clearly by the marginal index or syllabus accompanying the Code, as reported to the legislature and adopted by it. The section is there described as covering "acts contrary to good morals and common decency." This syllabus became a part of the law, and furnishes, as said by Mr. Justice McARTHUR, "the highest source from which to draw information as to the nomenclature of the said Code": *State v. Vowels*, 4 Or. 324. It is true, the offenses referred to were technically denominated "nuisances" at common law, and that term does not occur in the statute; but the language used is essentially descriptive of the general character of such offenses, and quite equivalent thereto. Certain acts were punishable as nuisances at common law because they outraged public decency and were against good morals, such as habitual, open and notorious lewdness, roaming the streets naked (*Wharton, Crim. Law*, § 1432), the indecent exposure of the person on a highway or in a public place (*State v. Rose*, 32 Mo. 560; *Gilmore v. State*, 118 Ga. 299, 45 S. E. 226), the exhibition of an unseemly or obscene sign or picture (*Knowles v. State*, 3 Day, 103; *Commonwealth v. Sharpless*, 2 Serg. & R. 91, 7 Am. Dec. 632), and other similar matters. Other acts were likewise punishable because they injuriously affected the public health, such as maintaining slaughterhouses in a populous neighborhood, or the exposing for sale for human food of putrid or infected articles which were injurious to the health, and the like: *Wharton, Crim. Law*, § 1433, et seq.

Still other acts were punishable because they disturbed or injured the public peace or morals, by congregating large num-

bers of idle and dissolute persons in one place for vicious purposes, and of such were common gaming houses. The keeping of such a house was a separate and well-defined offense at common law, entirely independent of the criminality of the business conducted therein. It was punishable as a nuisance before any sort of gambling was prohibited or even considered to be against public policy, because it tended to draw together disorderly persons, and to encourage vice, idleness, and breaches of the peace: 4 Cyc. 485; 7 Bacon, Abridg. 223; 3 Archbold, Crim. Pl. 609; *United States v. Dixon*, 4 Cranch, C. C. 107 (Fed. Cas. No. 14970); *King v. Dixon*, 10 Mod. *336; *King v. Medlor*, 2 Showers, *36; *Jenks v. Turpin*, 13 L. R. Q. B. D. 505; *State v. Layman*, 5 Har. (Mich.), 510. In Hawkins' Pleas of the Crown (book 1, c. 32, § 6), it is said: "All common gaming houses are nuisances, in the eye of the law. * * not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood." In 1 Russell on Crimes, p. 741, the principle upon which common gaming houses are punishable as nuisances is said to be that they are "detrimental to the public, as they promote cheating and other corrupt practices, and incite to idleness and avaricious ways of gaining property great numbers, whose time might otherwise be employed for the good of the community." Mr. Chief Justice BRONSON says: "I have no doubt that the keeping of a common gaming house is indictable at the common law: *The King v. Rogier*, 1 B. & C. 272; *People v. Sergeant*, 8 Cow. 139. It is illegal, because it draws together evil-disposed persons, encourages excessive gaming, idleness, cheating, and other corrupt practices, and tends to public disorder. Nothing is more likely to happen at such places than breaches of the public peace": *People v. Jackson*, 3 Denio, 101 (45 Am. Dec. 449). And in *Vanderworker v. State*, 13 Ark. 700, Mr. Chief Justice SCOTT says: "Independent of any statute, the keeping of a common gaming house is indictable at common law, on account of its tendency to bring together disorderly persons, promote immorality, and lead to breaches of the peace. Such an establishment is thus a common nuisance."

The keeping of a gaming house was therefore an offense at common law, because, among other things, it disturbed the public peace and tranquillity, by encouraging idleness, riot, thriftlessness, breaches of the peace, disorderly conduct, and the like.

By Section 1930, the willful and unlawful commission of an act which grossly disturbs the public peace or outrages the public decency and is injurious to public morals, if no punishment is provided by the Code, is made an offense and punished in a certain manner. "Willfully" means a purpose or willingness to commit the act referred to (B. & C. Comp. § 2176), and is equivalent to "knowingly" (*Wong v. Astoria*, 13 Or. 538, 11 Pac. 295); "wrongfully," that the act was done in violation of right or without authority of law: B. & C. Comp. § 2180. "Grossly" is defined by Webster to mean greatly, coarsely, shamefully, disgracefully; and "disturb," to throw into disorder or confusion, to interrupt the settled state of, to excite from a state of rest, to render uneasy. The statute therefore simply means that one who knowingly and without authority of law commits an illegal act which greatly or shamefully annoys or scandalizes the community, and agitates and disturbs the quiet and tranquillity of the public, or outrages public decency and is injurious to the public morals, is guilty of an offense, and punishable in a certain manner, if no other punishment is expressly provided therefor, and this is substantially the definition of a nuisance at common law: 21 Am. & Eng. Enc. Law (2 ed.), 683. It is not necessary, as counsel for defendant contend, that there should be an actual breach or disturbance of the peace, to come within the statute. Overt acts constituting breaches of the peace are distinct offenses, both by statute and at common law, and actual or threatened violence is an element thereof: *Ware v. Branch*, 75 Mich. 488 (42 N. W. 997). Violence, either actual or threatened, is not a necessary element to constitute the offense under the statute. It is sufficient that the public peace be grossly disturbed, and, as Mr. Bishop says, "the community is disturbed whenever it is alarmed": Bishop, Crim. Law (7 ed.), 541.

An immoral or criminal act, which, while not amounting to a breach of the peace, disturbs the quiet and tranquillity of society to the injury of public order and decorum, or disturbs or threatens the public peace, comes within the statute; and, as we have seen, it has been held by the courts from time immemorial that a common gaming house is of such a character. If the statute had declared the acts prohibited to be nuisances, it would have been no more certain than it now is. It would still have been necessary to resort to the common law to ascertain its meaning. In place of providing, as has been done in many states, for the punishment of nuisances, leaving it to be determined from the common law what specific offenses come within that term, the legislature thought it wiser to adopt the other course, and embody in the statute, as a description of the offenses prohibited, the essential ingredients of a common-law nuisance. There can be no substantial difference, however, between the two methods. One uses the technical name, leaving the essential elements of the offense to be determined from the common law, while the other sets forth the ingredients of the offense, leaving its technical name to be so ascertained. The result is the same.

4. It was said in argument that this section had been on the statute books for more than forty years, and that up to this time there has been no attempt to apply its provisions to common gaming houses, and it is urged that such fact is entitled to conclusive weight as to the practical construction of the meaning and operation of the statute. If the facts assumed in the argument are true—a matter concerning which we have no definite knowledge—it simply shows that the statute has been forgotten or disregarded, and affords no reason why the court should now refuse to administer the law as it is written. **AFFIRMED.**

Argued 13 Feb., decided 17 April, 1905; rehearing denied 30 Jan., 1906.

48 443
[48 618]

MAFFET v. OREGON & CAL. RAILROAD CO.

80 Pac. 439.

VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT—CHARACTER OF ESTATE INTENDED BY THE PARTIES TO BE CONVEYED.

1. A contract by a grantee of public land under an act of congress to convey "unto the second party, their heirs and assigns (upon request and surrender of this contract, provided the said party of the first part

shall have then received the patent therefor from the United States, and when said lands hereby contracted to be sold shall have been patented to said party of the first part), a deed conveying all the right, title, and interest of the first party in and to said premises," manifestly contemplates that the purchaser is to receive the fee simple title, and not a qualified or inferior right to the land, unless it should be mineral, in view of the terms of the government grant as stated in 14 Stat. U. S. c. 242.

TIME AS ESSENCE OF CONTRACT—INCREASED INTEREST AFTER DEFAULT—CONSTRUCTION OF FORFEITURE CLAUSE.

2. A contract for the conveyance of land providing for payment by installments with interest, that a higher interest shall be paid if any installment becomes overdue, declaring time to be of the essence of the agreement, and that upon a failure to make any payment when due the contract shall become null and void, and all rights of the vendee shall cease without any declaration of forfeiture or act of re-entry or any other act by the vendor to be performed, is self-forfeiting, and the provision for higher interest upon a failure to make any payment when due is not a penalty available to the vendee as condition of avoiding the forfeiture.

WAIVER OF CONDITIONS BY VENDOR.

3. Conditions for the benefit of the vendor in a contract of sale, as, the right to forfeit, or the acceptance of a self-executed forfeiture, may be waived at his option and performance be tendered as stipulated.

HOW WAIVER MAY BE INDICATED.

4. A waiver of self-executing provisions for forfeiture in a contract for the sale of land may be accomplished by an express agreement, or by unequivocal acts or demeanor leading the purchaser to neglect strict and punctual compliance with the terms of the contract in reliance thereon.

REINSTATING CONTRACT AFTER WAIVING FORFEITURE—NOTICE.

5. A vendor who has once waived a forfeiture incurred by the terms of a contract for the sale of land cannot ordinarily again assume his original relations to the vendee, and insist upon the enforcement of the forfeiture, without giving the vendee proper notice of his intention so to do, and reasonable time within which to comply with the demand for payment.

RESCISSION—ACTION FOR PRICE PAID AS MONEY HAD AND RECEIVED.

6. Upon a refusal by a vendor to comply with his contract to sell and convey, the purchaser may also rescind and maintain an action for the purchase money already paid.

This case illustrates the rule: A contract for the sale of land declared time to be of its essence, and provided for a self-executing forfeiture in case of default in payment of any installment of the purchase price. Owing to uncertainty as to the state of the vendor's title, the parties entered into a supplementary agreement whereby further payments were to be dispensed with until such title was settled. In reliance on this later agreement the purchaser refrained from making the additional payments required by the original contract, when the vendor, some years later, and without any notice or request for payment, canceled the contract and forfeited all money paid under its provisions. *Held*, that the purchaser was justified in accepting the rescission, thereby rendering it mutual, and in suing for the price paid as money had and received to his use.

EFFECT OF DESIGNATING A PARTY AS "TRUSTEE"—SURVIVORSHIP.

7. A contract or deed describing parties thereto as "trustees," without explanation, implies a trust in favor of an undisclosed principal; and in enforcing a contract based on such an instrument the survivor must sue alone to the exclusion of the personal representatives of the deceased trustee.

From Multnomah: ARTHUR L. FRAZER, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

Action by William R. Maffet, Jr., trustee, against the Oregon & California Railroad Co. to recover sundry sums had and re-

ceived by defendant to plaintiff's use, resulting in a judgment for plaintiff in the sum of \$21,619.38, from which this appeal is taken.

On December 31, 1889, the defendant as party of the first part, and E. T. McKinney and Wm. R. Maffet, Jr., trustees, of the second part, made and entered into a contract whereby the defendant agreed to sell and McKinney and Maffet to purchase 5,172.28 acres of land lying in the place and indemnity limits of the grant by congress by act of July 25, 1866, to the first party, for the sum and price of \$64,362.07, payable as follows: \$6,436.20 on the day of the execution of the contract, and the balance, or \$57,925.87, on December 31, 1894, with interest on such balance at the rate of 7 per cent per annum, payable annually in the mean while, being \$4,054.81 December 31, 1890, \$4,054.81 December 31, 1891, \$4,054.81 December 31, 1892, \$4,054.81 December 31, 1893, and \$4,054.81 December 31, 1894. Other stipulations, so far as it is necessary to set them forth, are as follows:

"The party of the second part (McKinney and Maffet) may at any time pay the agreed price of either of said tracts separately as shown by the schedule. * * and shall thereupon be entitled to a conveyance of all the right, title and interest of the first party (the O. & C. Railroad Co.) therein, and the second party shall not cut or remove, nor allow to be cut or removed, any timber from either of said tracts of land without first paying such agreed price thereof, otherwise the whole of said sum of \$57,925.87 shall become immediately due and payable. * * And if any of the said sums, either of principal or interest, shall not be paid at the dates above specified, then such sums shall bear interest in gold coin from such dates at the rate of ten per cent per annum, payable annually until payment.

"And the second party in consideration of the premises hereby agrees * * that they will make punctual payment of the above sums as each of them respectively becomes due. * * In case the second party, their legal representatives or assigns, shall pay the several sums of money aforesaid punctually and at the times above limited, and shall strictly and literally perform all and singular the agreements and stipulations aforesaid, according to their true tenor and intent, then the first party will cause to be made and executed unto the second party, their heirs and assigns (upon request and surrender of this contract, provided the said party of the first part shall have then received a patent

therefor from the United States, and when said lands hereby contracted to be sold shall have been patented to the said party of the first part), a deed conveying all the right, title and interest of the party of the first part in and to said premises. * *

"And it is hereby agreed and covenanted by the parties hereto that the times of the payments are of the essence of this contract. And in case the second party shall fail to make the payments aforesaid, and each of them, punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid strictly and literally, without any failure or default, then this contract, so far as it may bind the first party, shall become utterly null and void, and all rights and interests hereby created or then existing in favor of the second party, or derived from them, shall utterly cease and determine, and the right of possession and all legal and equitable interests in the premises hereby contracted shall revert to and revest in said first party, without any declaration of forfeiture or act of re-entry, or any other act by said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully and perfectly as if this contract had never been made.

"And said party of the first part shall have the right immediately upon the failure of the party of the second part to comply with the stipulations of this contract, or any one of them, to enter upon the land aforesaid, and take immediate possession thereof, together with the improvements and appurtenances thereto belonging. And the said party of the second part covenants and agrees that they will surrender unto said party of the first part the said lands and appurtenances without delay or hindrance, and no court shall relieve the party of the second part from the failure to comply strictly and literally with this contract."

The plaintiff, for cause of action, sets out this contract, and alleges, in substance, that the vendees paid to defendant in pursuance thereof \$6,436.20 December 31, 1889, as part payment of the purchase price, and thereafter paid further sums as follows: \$2,027.41 March 2, 1891, \$202.75 September 21, 1891, \$1,000 December 30, 1891, \$1,027.10 January 28, 1892, and \$1,000 July 25, 1892; all of which were received, accepted, and retained by defendant. Then, after detailing certain matters tending to render it more or less uncertain and questionable whether defendant would be able shortly to obtain its title from

the general government, as it claimed, by virtue of the said act of congress, it is further alleged that in view and consideration of the complications thus arising, and of a doubt occasioned thereby as to the ability of the defendant to establish its title to all or any of the lands described in said contract, or to obtain patents therefor from the United States on or before the time fixed for the last payments of principal and interest, and in further consideration that each of the parties to said contract would waive and forego its or their rights to a strict and literal performance of the terms and of the stipulations and provisions making time of the essence thereof, and for the convenience and interests of each of the parties thereto, they did, on or about July 25, 1892, make and enter into a mutual understanding, arrangement, and agreement, whereby it was agreed that no further payments of interest or principal nor any demand for conveyance of the title to any of such lands should be made until the right of the company to the whole should be finally established and patents issued therefor, and it should be in a condition to convey an indefeasible title thereto in fee simple, and that every right to a strict and literal performance of the terms stipulations and provisions of the said contract in behalf of either or both of said parties should be annulled, and thereby waived and renounced; that the right of defendant to any portion of said lands was not finally established until the decree of the Supreme Court of the United States, rendered about January 8, 1900; that the right to that portion of the same included in the Bull Run Reserve, set aside by the President as a public reserve, has never yet been established or recognized by the United States government; and that the equitable title of Himpel and Neppach, as his assignee, in a portion of said lands, so remained in them until May 10, 1900; but that, notwithstanding such conditions as to the title, and prior to any patent having been issued by the general government to the defendant to any portion of said lands, the defendant, on March 27, 1900, wrongfully and fraudulently broke said contract, refused to perform and repudiated, rescinded and canceled the same by a written notice to plaintiff and McKinney, trustees, in form as follows:

"Referring to the former contract number 3,354, of date December 31, 1889, made with you by the Oregon & California Railroad Co. for the sale of certain lands in said former contract described, this is to notify you that the company hereby forfeits and cancels said contract for failure upon your part to comply with the terms and conditions, to-wit: failure to make payment of the purchase price, and you are hereby notified that said contract is no longer of any force and effect."

Continuing, it is alleged that ever since the giving of said notice the defendant has claimed and asserted that said contract was forfeited and canceled, and has refused to recognize the same as operative and binding; that E. T. McKinney, trustee, has died since the execution thereof, and that plaintiff is now the sole surviving trustee; that prior to the commencement of this action plaintiff demanded repayment of the several sums paid to defendant under said contract, with interest at the rate of 8 per cent per annum, amounting in the aggregate to \$21,619.38, which was refused; and that by reason of the premises defendant is indebted to plaintiff in the sum stated, for which amount judgment is prayed.

The defendant demurred to the complaint, assigning three grounds therefor: First, that it does not state facts; second, that plaintiff has not legal capacity to sue, and that there is a defect of parties, in that plaintiff cannot sue without joining with him the personal representatives of E. T. McKinney, deceased; and, third, that the cause, if any plaintiff has, accrued more than six years prior to the commencement of the action. The demurrer being overruled, the defendant answered. The answer admits the execution of the contract virtually as alleged, and the payments, but denies all inducement set out leading to the alleged waiver agreement, or that such an understanding arrangement or agreement was ever entered into, or that defendant in any manner broke the said contract of December 31, 1889, by refusing to perform, or that it rescinded or canceled the same by written or other notice, but alleges that on the 27th day of March, 1900, it did, by reason of the failure and default of the vendees to pay the purchase price of said lands in accordance with their agreement so to do, and to keep and perform the terms of said contract on their part, send to the plaintiff the

written notice referred to, and thereby gave them formal notice that said contract was no longer of any force or effect because of such failure on their part to comply with its terms. They also deny the further allegations of the complaint and set up three separate defenses, which need not be stated at this time. Upon this state of the record plaintiff moved for judgment in his favor and against the defendant for the amount prayed for, which motion being allowed the defendant appeals.

REVERSED.

For appellant there was a brief over the name of *William David Fenton*, with an oral argument by *Mr. Fenton* and *Mr. William Coleman Bristol*.

For respondent there were briefs over the names of *Watson, Beekman & Watson, George William Pyle Joseph*, and *Dolph, Mallory, Simon & Gearin*, with oral arguments by *Mr. Edward Byers Watson* and *Mr. John M. Gearin*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

Under the pleadings there are virtually but two contentions: One on the part of the defendant that the complaint does not state facts sufficient to constitute the cause of action preferred—that is, for money had and received, as if the defendant had wrongfully rescinded the contract; and the other, on the part of the plaintiff, that he is entitled to a judgment on the pleadings, because it is urged the answer virtually admits plaintiff's right of recovery.

1. The gravamen of the defendant's contention as to the insufficiency of the complaint, if we fully understand it, is that by the alleged compromise agreement, which, for the purposes of the question in hand, must be taken as having been duly and regularly entered into, the plaintiff has ratified, sanctioned and affirmed the original contract, so that he was no longer or subsequently entitled to rescind, that the position thus voluntarily assumed rigidly bound him to the contract, and for any subsequent violation of it on the part of the defendant the only action open to him was for a breach, and that under no conditions would he be allowed to rescind, and then sue for a return of the

purchase money, as if no contract had ever been entered into. To get our bearings, we must first look to the contract to determine its true import and meaning, for by it the parties were wholly to be governed in their subsequent dealings with each other. We need to notice but two features. A clause provides that the vendees may at any time pay the agreed price of any of the designated tracts separately, as per schedule attached, and thereupon be entitled to a conveyance of all the right, title and interest of the railroad company therein. A subsequent clause provides that, in case the vendees, their legal representatives or assigns, shall pay the several sums of money agreed upon punctually and at the times limited, and shall strictly and literally perform, etc., then that the railroad company will cause to be made and executed unto the vendees, their heirs and assigns (upon request and surrender of the contract, providing the railroad company had then received and obtained from the United States a patent thereto, and when said lands thereby contracted to be sold shall have been patented to the railroad company), a deed conveying all the right, title, and interest of the company in and to said premises.

The question for consideration is whether the railroad company contracted to sell and convey to the vendees the entire fee-simple interest in the lands described, or merely its right, title and interest therein at the time, be that what it may. It is well understood extraneously that the company was earning and procuring these lands from the general government through the act of congress of July 25, 1866. The parties were negotiating with reference to the title to be thus acquired. The general government being the source of all true title to the public domain must be presumed, and it was no doubt the idea that possessed the minds of both vendor and purchasers that they were dealing with reference to a conveyance of the fee-simple or ultimate title to the premises, barring only such reservations as may have been withheld by congress, the act having reserved nothing except that mineral lands were not to be included: 14 Stat. U. S. c. 242, p. 239. It is impossible to discern, under the attending circumstances, that the parties had in mind any other or lesser title than this. By the clause first in order one would naturally

infer that it was the purpose of the company to execute a deed at once to the purchasers to any parcel of the land included in the contract upon which they might elect to pay the scheduled price. The clause does not say that, however, but only that the purchaser shall be entitled to a conveyance of all the right, title and interest of the company. But when? If read in *pari materia* with the subsequent provisions upon the subject—which we are inclined to think it should be—it becomes at once manifest that it was not the intendment that any deed should be executed or delivered to the purchasers, their personal representatives or assigns, until the patent had first been issued to the company by the general government. But whether this clause applies to parcels separately paid for or not, the stipulation makes it absolutely clear that where it is sought by the purchasers to pay the full purchase price, and otherwise perform, so as to entitle them to a deed to all the lands, one would not be demandable until the company had first acquired a patent from the general government. So that, looking to the species of title the company expected to acquire, and the ultimate performance on its part by a conveyance of all its right, title, and interest, it follows by irresistible sequence that the parties were dealing with reference to the fee-simple or ultimate title, and not to any qualified right or interest therein less than the whole.

2. As to the other feature, the contract provides that the balance of the purchase price shall be paid on the 31st of December, 1894, with interest thereon in the mean time at the rate of 7 per cent per annum, payable annually, counting from the date of the first payment, to-wit, December 31, 1889. On December 31, 1890, therefore, \$4,054.81 became payable, and a like amount on the 31st of December of each succeeding year to and inclusive of December 31, 1894, when the balance was payable. It further provides, following some intervening stipulations, that if any of the said sums, either of principal or interest, shall not be paid at the dates specified, then that such sums shall bear interest at the rate of 10 per cent per annum. Then follow varying, explicit and positive provisions touching the strict and literal performance of the contract on the part of the purchasers, and with a view to making time of the essence of the contract. Now, it is

strenuously insisted on the part of plaintiff that the stipulation as to the increased rate of interest to be paid on defaulted or overdue payments is within itself a waiver on the part of the company of any default that might be incurred on the part of the purchasers by reason of any failure to meet payments on the dates specified. We cannot concur in this view. The clause must be construed, of course, in connection with the other clauses in the contract relating to the subject of forfeiture, and when so construed the true intendment is perfectly manifest. The provisions respecting a strict and literal performance on the part of the vendees going to emphasize the direct and positive stipulation that time shall be of the essence of the contract are so numerous, and asserted with such varying stress and impressiveness, that there can be no mistake as to their real purpose. They even go to the utmost verge of declaring that the courts shall not relieve the purchasers from their failure to observe their conditions exactly and punctually.

3. These stipulations were inserted wholly and solely for the benefit of the vendor. They could not serve the purchasers in any way, as the latter would be precluded from taking the least advantage of their own default. Being for the benefit of the vendor, it might, if it so desired, waive their strict and literal observance on the part of the purchasers, and this it could do in advance of the time of agreed performance. So it could, if it saw fit to, forego a forfeiture already incurred, and thereafter accept performance, and itself perform as if no default had taken place. The matter, therefore, of requiring exact performance on the part of the purchasers, lies wholly within the option or election of the vendor: *Dana v. St. Paul Invest. Co.* 42 Minn. 194 (44 N. W. 55); *Chambers v. Anderson*, 51 Kan. 385 (32 Pac. 1098); *Cartwright v. Gardner*, 5 Cush. 273, 281; *Manning v. Brown*, 10 Me. 49; *Mason v. Caldwell*, 5 Gilm. 196 (48 Am. Dec. 330); *Church v. Ayres*, 5 Cow. 272; *Wilcoxon v. Stitt*, 65 Cal. 596 (4 Pac. 629, 52 Am. Rep. 310). Seeing that such is the purpose of inserting the time-essence conditions, it becomes at once apparent why the clause providing for payment of the increased rate of interest in case the stipulated payments were not punctually made was inserted. It subserves two pur-

poses: (1) As a pressure to induce prompt payments on the part of the purchasers, and (2) to increase the vendor's compensation should it see fit to waive strict performance or a forfeiture, should one have been incurred. Nor does it signify an intendment, notwithstanding the provisions for prompt performance, that they should not be strictly observed, but was inserted so that, in case the vendor should choose to waive such observance, he might be entitled to a greater percentage of interest for his indulgence. In this view it is not inconsistent with the other provisions under discussion, as all can subserve their especial purposes without the least inharmony.

O'Connor v. Hughes, 35 Minn. 446 (29 N. W. 152), so implicitly relied upon by respondent, is not in conflict with this interpretation, for in that case the contract provided that, if there was any default in strict performance, the vendor should have the right at his election to declare it null and void; and it was held that, in the absence of a determination on the part of the vendor to require strict performance and of reasonable notice of such election on his part, the mere default of the vendee in making the specified payments would not operate to extinguish his equitable rights, and that a subsequent declaration of forfeiture by the vendor, without notice and reasonable opportunity to make payment, was also ineffectual. The difference between the two contracts is manifest and vital. By the one we are construing, a forfeiture is incurred upon default in payment at once, and by force of positive stipulations to that effect; but in that one the vendor was accorded the right, at his election, to declare the contract null and void on account of the default, and without such declaration properly and timely made there could be no forfeiture. It is true that in the course of construing the contract the clause respecting overdue payments drawing an increased rate of interest was considered among the rest as indicating as well an intendment that the default was not of itself to work a forfeiture. This, however, was natural, for the forfeiture was not made to depend merely upon the failure of payment strictly and punctually at the time specified, but upon the election also of the vendor to declare the contract null and void. If he should have permitted the contract

to run on after default without declaring a forfeiture, then it was the intendment that he should be entitled to the increased rate of interest on defaulted payments. So it is here, if the vendor elects to waive the time of payment or a forfeiture that has been incurred by force of the very terms of the contract itself, as distinguished from electing to declare a forfeiture, as in that contract contemplated, then it was the intendment that he should be entitled to the increased interest. The difference is, we state it again, that in the one case the vendor must elect to declare the forfeiture for a default of the purchaser, without which the contract runs on, remains operative, and in the other he might, if he so elects, waive the default and forfeiture that follow by force of the contract without any act of his; and in case of such election we say he is entitled to the increased rate of interest, and there is no incongruity with the idea of strict performance. If the contract does not mean this, the increased interest clause would, in effect, operate to nullify all the repeated, positive and unequivocal stipulations inserted with the unmistakable purpose of making time of the essence of the contract by its own terms unconditional upon any act of the vendor. *Burroughs v. Jones*, 79 Miss. 214-218 (30 South. 605), seems to give a like construction to a similar contract. By the adjudications, both at law and in equity, the effect of such time-essence stipulations, terminating the contract upon a failure to comply strictly and punctually with its conditions, is to entail a forfeiture by sheer force of the contract itself upon the mere default of the purchasers by their failure to make payments at the times designated as they obligated themselves to do: 2 Warvelle, Vendors (2 ed.), § 813; *Snider v. Lehnherr*, 5 Or. 385; *Cleary v. Folger*, 84 Cal. 316-319 (24 Pac. 280, 18 Am. St. Rep. 187); *Martin v. Morgan*, 87 Cal. 203 (25 Pac. 350, 22 Am. St. Rep. 240); *Foot v. Bush*, 72 Iowa, 522 (69 N. W. 874); *Wells v. Smith*, 2 Edw. Ch. 78; *Dauchy v. Pond*, 9 Watts, 49; *Benedict v. Lynch*, 1 Johns. Ch. 370 (7 Am. Dec. 484); *Cartwright v. Gardner*, 5 Cush. 273; *Drown v. Ingels*, 3 Wash. St. 424 (28 Pac. 759).

There is some divergency of opinion as to when and under what conditions equity will relieve against a default in punctual

payment, even though time may seem to be made of the essence of the contract, owing to the principle of equitable conversion and consequent vesting of the equitable title to realty in the vendee: 1 Pomeroy, Eq. Juris. § 454. But, however this may be, it is plain that the law affords no such relief. In that forum all payments to be made prior to the time in which it is agreed that title shall pass, where time is made material, are conditions precedent, and, unless made promptly, the payee is without right of relief. *Haggerty v. Elyton Land Co.* 89 Ala. 428 (7 South. 651), affords an apt illustration showing the distinguishing characteristics as between the equitable and the legal right. The court says: "By the contract of sale an equitable interest vested in Haggerty and in respect to the forfeiture of this equitable interest—that is, of the money consideration paid and the materials furnished and work done upon the improvements—the condition may be regarded as subsequent. By the express terms of the bond for title he did not and could not become entitled to a conveyance of the legal estate, except by performance of the condition: as to this it is precedent." But in that case the court refused to grant relief, although in equity, because time had been made of the essence of the contract. So that under the contract in question, forfeiture having been entailed by force of the stipulations of the parties to that effect, without more—that is, without any affirmative act on the part of the railroad company—it was at liberty to re-enter and retake possession of the lands at once upon the happening of default in payment upon the part of the purchasers, providing the contractual relations remained the same.

4. The railroad company could, however, waive a default or consequent forfeiture, if it so desired, which, as we have seen, is a matter of its own choice or election. This it might do by express agreement to that purpose, or it might do it by unequivocal acts or demeanor affording reasonable and proper inducement for the purchasers in reliance thereon to alter their course as to strict and punctual compliance: 2 Warvelle, Vendors (2 ed.), §§ 819, 820, 821; *Neppach v. Oregon & Cal. R. Co.* 46 Or. 374 (80 Pac. 482); *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Watson v. White*, 152 Ill. 364 (38 N. E. 902); *Mouson v. Bragdon*, 159 Ill. 61 (42

N. E. 383); *Thayer v. Meeker*, 86 Ill. 470; *Wheeling Gas Co. v. Elder*, 54 W. Va. 335 (46 S. E. 357).

5. But, if the waiver was once accomplished, the vendor could not again assume the original relations, and insist upon a forfeiture, unless upon a subsequent default, not within the purview of the waiver, without giving the purchasers proper notice of its intention so to do and a reasonable time in which to comply with the demand for payment: *Watson v. White*, 152 Ill. 364 (38 N. E. 902); *Mouson v. Bragdon*, 159 Ill. 61 (42 N. E. 383); *Eaton v. Schneider*, 185 Ill. 508 (57 N. E. 421); *Thayer v. Meeker*, 86 Ill. 470; *O'Connor v. Hughes*, 35 Minn. 446 (29 N. W. 152).

6. With this understanding of the contract and its effect as to the rights of the parties, we may determine whether, under the complaint as tested by the demurrer, the plaintiff is entitled to recover. This waiver agreement, when acted upon, would be operative at least as a waiver of prompt payment as per the stipulations in the contract, if it was not in reality a modification or an ingrafting of new and different conditions upon the contract itself. The parties so treating with reference to the original contract knowing all the attending conditions, it might be conceded, as contended by defendant, we think, but without deciding, that it was tantamount to a ratification or affirmation of the contract at that time; but it does not follow that there might not thereafter be a rescission by the mutual agreement of the parties, express or implied: *Owen v. Pomona Land Co.* 131 Cal. 530 (63 Pac. 850, 64 Pac. 253). It should be noted in this connection that there was nothing for the purchasers to return to the end that they might place the vendor in statu quo. They had received nothing at its hands, except, perhaps, they might have gone into possession of the property, which they had a right to do under the contract. Being prevented by their own undertaking from removing any timber from the lands, we must presume that they have not broken the contract in that respect. So that they have received nothing which they would be required to return to the company in order to place it in statu quo as a condition to a rescission on their part, nor has the company been put to any expense or inconvenience by sufferance of the pur-

chasers. The complaint proceeds upon the theory that, while the contract was still operative, being so continued by virtue of the alleged waiver agreement, the defendant, without right, by the notice of March 27, 1900, repudiated and rescinded such contract; and the plaintiff, taking it at its word, assented thereto, and thus by mutual agreement rescinded, which entitled plaintiff to a return of the money paid on the faith of the contract. Taking it, therefore, for granted that the agreement for a waiver as to time of payments until patents issued to the defendant was made as alleged, the notice of March 27, 1900, was a palpable repudiation of all existing contractual relations between the parties, and in consequence tantamount to a rescission on the part of the company. The notice refers, it is true, to the "former contract" of December 31, 1889, but it forfeits and cancels said contract for failure to make payment of the purchase price as agreed upon, which, if of any force by virtue of the waiver agreement, was a virtual rescission in toto. The plaintiff had a right, under the attending conditions, notwithstanding any ratification or reaffirmance of the contract as first entered into, to say to the company: "Very well, since you refuse to be bound further by your engagements, I assent to your rescission." This the law says is, in effect, a mutual rescission.

Treating the defendant's declaration that the contract is canceled, and no longer of any force or effect, as an abandonment, the plaintiff might himself abandon, and, the contract having thus come to an end, he might very well, as he has done, sue at law to recover what he has paid: *Glock v. Howard & W. Colony Co.* 123 Cal. 1, 10 (55 Pac. 713, 719, 43 L. R. A. 199, 69 Am. St. Rep. 17). Mr. Justice HENSHAW, in further consideration of this case, says: "There have been many cases before this court involving the rights of parties to agreements for the sale and purchase of real estate, in which it has been held that, after the parties have rescinded the agreement or mutually agreed to abandon, the vendee may recover the money which he paid in part performance of his contract"; citing cases. This court, however, has settled the principle by the language of Mr. Chief Justice MOORE in *Graham v. Merchant*, 43 Or. 294, 304 (72 Pac. 1088, 1090), as follows: "When a vendor abandons his con-

tract to convey, the vendee, in his choice of remedies, may elect to rescind the contract, and thereupon maintain an action at law to recover what he has paid thereon as money had and received." Thus it is that an abandonment by one party may be treated as a proposition to rescind by the other and thereupon he may also abandon, and thus arrive at a mutual agreement to rescind, and the law so treats the correlative acts of the parties: 2 Warvelle, Vendors (2 ed.), § 826; *Cummings v. Rogers*, 36 Minn. 317 (30 N. W. 892); *Wheelden v. Fiske*, 50 N. H. 125. The parties could as well rescind a ratified or reaffirmed contract by mutual agreement, there being nothing to return or do in order to reinstate statu quo conditions, as they could the original, and, having so mutually rescinded here, the plaintiff was entitled to maintain the action.

7. Another objection is urged to the complaint, namely, that the action is being prosecuted by Maffet in a representative capacity as trustee, when it is insisted that it should have been instituted by him individually, or rather in such latter capacity, having joined with him the survivors of McKinney, deceased, neither of which requisites to the maintenance of the action has been observed. The contention is based upon the premise that the term "trustees" was used in the contract as *descriptio personarum*. Prima facie, however, the term, without more, implies a trust in favor of an undisclosed beneficiary, and hence we cannot say, from the face of the contract itself, that plaintiff and McKinney were not in fact trustees, and the complaint is good against the objection. If trustees, the survivor must, it is admitted, sue in exclusion of the personal representatives of the deceased co-trustee: *Perry, Trusts* (5 ed.), § 158; *Sturtevant v. Jacques*, 14 Allen, 523; *Shaw v. Spencer*, 100 Mass. 382 (97 Am. Dec. 107, 1 Am. Rep. 115). Under the construction we have given the contract, and considering also the effect of the alleged waiver agreement, the third ground of demurrer is without relevancy or force. The demurrer was therefore properly overruled.

This brings us to the question arising upon the motion for judgment on the pleadings. The argument of plaintiff in support of the motion is that the alleged agreement as to the waiver

of the time-essence stipulations should be treated as if not asserted in the complaint, and when so treated he is entitled to judgment notwithstanding the answer of the defendant, which seems to controvert none of the allegations of the complaint material to this inquiry, except those relating to such agreement. It proceeds upon the theory that the contract, construed as a whole—that is, considering the clause providing for the payment by the purchasers of an increased rate of interest in case they failed to make their payments punctually with those other provisions calculated in themselves to make time strictly of the essence of the contract—signifies an ultimate intendment that the purchasers might make the payments at any time, and that they would not incur a forfeiture so long as the vendor did not itself elect to declare it, and that, so construed, there had been no default or forfeiture on the part of the purchasers when the defendant gave the notice of March 27, 1900, declaring the contract canceled, and no longer in force or effect. Such, however, is not, as we have shown, the reasonable and proper interpretation of the contract under the authorities. Barring the alleged agreement of July 25, 1892, a forfeiture took place by force of the terms and stipulations of the contract when the purchasers failed to pay the interest installments as they became due. By the acceptance of payments on the first and second installments after they became due and payable, it might be that the company waived these defaults; but otherwise it has done nothing that could be construed into a waiver of the third and subsequent installments. Thus it would appear that the contract had been forfeited long before the notice of cancellation was given. But, as the forfeiture did not depend upon the vendor's election to forfeit, but took place by the terms of the contract itself, the notice meant nothing more than an intendment to insist upon a right to which the company was entitled without it. It could hardly be considered that under such conditions the notice was in itself a waiver of the defaults and consequent forfeiture, and at the same time an election on the part of the railroad company to forfeit the contract, so that in this view, it was absolutely essential to the statement of a good cause of action that the complaint show, by apt allegations, a

waiver in some manner by the railroad company of the default in payments and the forfeiture of the contract on the part of the purchasers consequent upon such default. This the plaintiff did, however, by setting up the agreement to postpone an insistence upon punctual payments until defendant was ready to convey its title to be acquired from the general government, which, being negatived by the answer, an issue was thus raised that should have been tried out.

There was error, therefore, in allowing the motion for judgment on the pleadings, for which the judgment of the circuit court will be reversed, and the cause remanded for such other proceedings as may seem proper.

REVERSED.

Argued 6 April, decided 22 May, 1905.

FALING v. MULTNOMAH COUNTY.

80 Pac. 1009.

**POWER OF COUNTY COURT TO COMPEL SUPPORT OF PAUPER RELATIVES—
CONSTRUCTION OF STATUTE.**

Under Sections 2653 and 2654, B. & C. Comp., providing that county courts shall have superintendence of the poor, and that poor persons must be supported by their relatives, if the latter have the financial ability, the county court must hold a hearing, upon notice, as to the conditions and causes involved, and if it then appears that the relatives ought to contribute to the support of the poor person, the court may enter an order directing the relatives to contribute. If this order is not obeyed, or the sum contributed is not sufficient, the county may maintain an action to recover a reasonable sum for the care of the poor person, but it cannot itself compel payment of any sum.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

The county court for Multnomah County, sitting in the transaction of county business, cited Xarifa J. Faling, plaintiff, to appear before it and show cause why she should not be directed to support her brother, Cornelius W. Barrett, or pay to the county for the use of the poor the sum of \$30 a month, or such other sum as the court might deem sufficient. The plaintiff, appearing specially, moved to quash the order requiring her to show cause on the grounds, first, that the petition does not state facts justifying the order; and, second, that the court is without power or jurisdiction to make it. The motion being overruled, and the plaintiff refusing to plead further, an order and decree was entered by Lionel R. Webster, county

judge, in accordance with the prayer of the petition, requiring plaintiff to support the defendant, and, in case of her failure in that regard, that she pay to the County of Multnomah for the use of the poor the sum of \$30 a month so long as she continues in such failure. The proceeding was certified to the circuit court in obedience to a writ of review, wherein the order was affirmed, and Mrs. Faling appeals from the judgment there rendered.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Thomas Nelson Strong*.

No appearance for respondent.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The sole question necessary to be determined is as to the extent of the power accorded the county court sitting in the transaction of county business in the premises. By statute the county courts of the several counties of the State are vested with exclusive superintendence of the poor. It is further provided that every poor person who shall be unable to earn a livelihood in consequence of bodily infirmity or other cause shall be supported by the father, mother, children, brothers or sisters of such poor person, if they or either of them be of sufficient ability; and every person who shall fail or refuse to support his or her father, mother, child, sister or brother, when directed by the county court of the county where such poor person shall be found, shall forfeit and pay to the county, for the use of the poor of the county, the sum of \$30 per month, or such other sums as the court shall find sufficient, to be recovered in the name of the county court for the use of the poor as aforesaid before any justice of the peace or any court having jurisdiction: B. & C. Comp. §§ 2653, 2654. The policy of the law is apparent. The county court is vested with exclusive superintendence of the poor, and the duty of a relative to support a poor relative within the degree of consanguinity designated is enjoined. This much is explicit and clear. The county court is accorded the further authority, by the strongest implication, to direct such relative possessing the ability to discharge that

duty. This in furtherance of its superintendence of the poor. The court could not very well direct the relative to discharge the duty thus enjoined upon him without according him a hearing, and to such purpose it would not be improper to cite the alleged delinquent to appear before it to show cause why the direction should not be made. Several things are to be inquired into by the court before it could regularly enter the order. It should determine the degree of consanguinity, the capability of the alleged pauper, whether he has become such from intemperance or other bad conduct, and the ability of the relative to discharge the duty. Upon these questions, and others, it might be, the relative is entitled to a hearing in regular course before he can be adjudged delinquent and derelict in duty and directed to render support.

Further, however, than for the determination of these things, necessary for rendering the order against the delinquent relative, we think it was not intended that the county court should have jurisdiction. The forfeiture spoken of is entailed by refusing to observe the direction of the county court, which gives the county a right to recover in the name of the county court against the relative refusing to obey the order, and a proper proceeding may be instituted for that purpose before a justice of the peace or any court having jurisdiction, and it is the province of this latter court to determine as to the forfeiture and the amount proper for recovery. In such a proceeding the county court would not become its own arbiter, but its position would be the same as any other litigant, free to establish its cause. Thus, the county court would have the means of showing what the expense would be of maintaining the pauper, which would be the proper measure of the recovery against the relative, and thus it may substantiate its cause. The statute was probably intended, not for the punishment of the relative refusing to obey the direction of the county court, but to give a remedy to the county by which to recover the amount necessary to the support of the pauper in its superintendence of the poor. Without further discussion of the statute, suffice it to say that such appears to be its intentment. So interpreted, it is clear that the county court has exceeded its jurisdiction in adjudging that the plaintiff

in the writ of review pay to the County of Multnomah for the use of the poor the sum of \$30 per month for each and every month so long as she should fail to obey the order. For this reason the judgment of the circuit court will be reversed, and the cause remanded with directions to modify the order and decree of the county court accordingly. **REVERSED.**

Argued 12 April, decided 22 May, 1905.

SMITH v. LEAVENWORTH.

80 Pac. 1010.

EVIDENCE IN CASE EXAMINED.

1. The testimony does not show that plaintiff's intestate ever exercised an option given him by the defendant Leavenworth.

REPRESENTATIONS BY MORTGAGOR—EFFECT ON MORTGAGEE.

2. Representations of a mortgagor to his creditors, made in the absence of the mortgagee, and without his knowledge that the mortgage debt had been paid, are not binding on the mortgagee.

From Jackson: **HIERO K. HANNA**, Judge.

Statement by **MR. JUSTICE BEAN**.

This is a suit by Luther Smith, as administrator, to foreclose a mortgage given by the defendant Leavenworth to the plaintiff's intestate, Nelson, on certain mining property in Jackson County, to secure the payment of a promissory note for \$2,000, due one year after date. The complaint contains an allegation that by mutual mistake certain property intended to be included in the mortgage was omitted from the description. As the court decided against plaintiff on that point, and he has not appealed, it will not be referred to further. After the recording of the mortgage, and before the commencement of this suit, two judgments were recovered against Leavenworth in actions at law, and the mortgaged property was sold to satisfy the same to one Witherell, who transferred his interest to the defendant Gregson. Gregson alone appears, and sets up as a defense that the note and mortgage from Leavenworth to Nelson were made in pursuance of an agreement between them by which Nelson obtained an option to purchase a one-fifth interest in Leavenworth's mining property for \$5,000, it being understood and agreed that in case he elected to exercise the option, and paid the further sum of \$3,000, Leavenworth would convey to him the interest in the

property, and the amount due on the note and mortgage should be considered as part of the purchase price, and the mortgage paid and satisfied; that, soon after the execution of the mortgage, Nelson exercised his option to purchase, and paid the remaining \$3,000, whereupon plaintiff surrendered up the note and mortgage as fully paid and satisfied, but the mortgage was not canceled of record. These averments are denied by the plaintiff, and upon the testimony the court found in his favor, and defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *E. B. Dufur* and *J. R. Hammersley*, with an oral argument by *Mr. Hayward Hamilton Riddell*.

For respondent there was a brief and an oral argument by *Mr. William Ira Vawter*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. The evidence shows that Leavenworth was, at the time he borrowed the \$2,000 of Nelson, the owner of a mine of more or less prospective value in Jackson County, and that he borrowed the money for the purpose of erecting an ore mill thereon. At the time the loan was made, Leavenworth gave to Nelson a written option to purchase within a year a fifth interest in the mine for \$5,000, if he so desired, and, in case he elected to do so, agreed to convey such interest upon the payment of \$3,000 in addition to the money loaned. There is no evidence whatever that Nelson ever exercised the option. On the contrary, the testimony of himself and Leavenworth is to the effect that he refused to take the property, and so notified Leavenworth before the option expired. Indeed, by that time the property had been attached by Leavenworth's creditors, and it would have been impossible for him to have complied with his contract if called upon to do so. It is true that, after the note and mortgage were made, Nelson loaned Leavenworth \$3,000 or more in cash, and became his surety and obligated to pay several hundred dollars in addition; but this was not in pursuance of the option, or with the intention of purchasing the property, but because of Leav-

enworth's importunity, and Nelson's good nature and faith in his representations as to the value of his mine.

2. It is in evidence that Leavenworth told his creditors that the mortgage had been paid, and that, acting upon this information, the actions at law upon which the defendant Gregson's title rests were commenced, and the judgments therein obtained; but his representations did not change the facts as they existed and were not binding on Nelson, who was not present, and knew nothing about them.

If the testimony of the witnesses in this case is to be believed, and there is no reason why it should not be, there is no alternative but to affirm the judgment, and it is so ordered. **AFFIRMED.**

Decided 3 July, 1905.

McCRARY v. BIGGERS.

81 Pac. 356.

CONTRACT BETWEEN MARRIED PERSONS AS TO MARITAL RIGHTS.

1. A contract between a wife and her husband for the relinquishment by him of his curtesy estate in her property, conferred by Sections 5544 and 5547, is entirely void both at law and in equity, as against the public policy of the State of Oregon.

ESTOPPEL TO CLAIM RIGHT OF CURTESY.

2. The fact that a husband agreed with his wife not to claim curtesy in her lands, in consequence of which she did not deed them to certain persons but devised them in her will, does not estop him from claiming the curtesy, even though he allowed such persons to take possession of the land, for the contract is wholly void and no one has changed any position in reliance on it.

From Union: ROBERT EAKIN, Judge.

This is a suit in equity for the specific performance of a waiver of all claim to curtesy in certain real property, commenced by Hattie McCrary and her husband as an answer to an action of ejectment commenced against them by G. W. Biggers. Other facts appear in the opinion. There was a decree for defendant on the pleadings, from which this appeal is prosecuted.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Charles H. Finn*, to this effect.

I. A bill in equity to enjoin the husband from claiming curtesy or making any claim by petition or otherwise to the real or personal property or estate of his deceased wife will lie where

he has expressly or impliedly consented to waive his claim to her estate before death: Page, Wills, § 137; *Cook v. Adams*, 169 Mass. 186; *Allen v. Brown*, 82 Wis. 364; *Gullette v. Farley*, 161 Ill. 566; *McBreen v. McBreen*, 154 Mo. 323, 327 (55 S. W. 463); *Heisen v. Heisen*, 145 Ill. 658 (34 N. E. 597); *Tiddy v. Graves*, 126 N. C. 620 (36 S. E. 127), and 127 N. C. 502 (37 S. E. 513).

II. Where a married woman acting under the power given by the statute executes a will with the husband's assent, disposing of all her estate to which curtesy would attach, the husband is barred of his curtesy: 11 Cyc. 1016; *Salton v. Salton*, 93 Mo. 307 (2 S. W. 95); *Garner v. Willis*, 92 Ky. 386 (17 S. W. 1023); *Hutchins v. Commercial Bank*, 91 Va. 628 (20 S. E. 950); *Chapman v. Price*, 83 Va. 892 (13 S. E. 879); *Silsby v. Bullock*, 92 Mass. (10 Allen) 94; *In re McBride*, 81 Pa. 303; *Tiddy v. Graves*, 126 N. C. 620 (36 S. E. 127), and 127 N. C. 502 (37 S. E. 513).

III. Special performance of a parol contract (even to will property) will be enforced by a court of equity when one party has wholly performed and the other party fails to perform it, and its nonfulfilment on the one hand would be fraud on the party fully performing: Pomeroy, Spec. Perf. 268; Hermann, Estoppel, §§ 725, 943; Page, Wills, § 92; *Kofka v. Rosicky*, 41 Neb. 328 (59 N. W. 788); *Carmichael v. Carmichael*, 72 Mich. 76 (16 Am. St. Rep. 328, 40 N. W. 173, 1 L. R. A. 596); *Canal Co. v. Hathaway*, 9 Wend. 463; *Storr v. Baker*, 6 Johns. Ch. 166 (10 Am. Dec. 316); *Rice v. Bunts*, 49 Mo. 516; *Evans v. Snyder*, 64 Mo. 516; *Trapuall v. Burton*, 24 Ark. 371; *Anderson v. Armisted*, 84 Ill. 452; *Dickson v. Dickson*, 24 Miss. 612; *Banks v. Roup*, 48 N. Y. 292; *Cody v. Owens*, 34 Vt. 598.

IV. Rights can be lost or forfeited by such conduct as would make it fraudulent and against conscience to assert them. Therefore, if one acts in such manner as intentionally to make another believe that he has not certain rights, or abandons them, and the other, trusting to that belief, does an act which he would not have done, the fraudulent party will be estopped from asserting his rights: Hermann, Estoppel, § 944; *Sherill v. Sherill*, 73 N. C. 8; *Young v. Vaughn*, 23 N. J. Eq. 325; *Mayor v. Hume-*

sey, 46 Tex. 371; *Blakeslee v. Starring*, 34 Wis. 538; *Shields v. Smith*, 37 Ark. 47; *Union Ins. Co. v. Mowry*, 96 U. S. 544.

For respondent there was an oral argument by *Mr. Thomas Harrison Crawford*, with a brief over the name of *Crawford & Crawford*, to this effect.

1. A married woman has no power or authority to bar her husband's right to become tenant by the curtesy in real property owned by her in her own right even by deed. This can only be done by the husband joining with the wife in a conveyance: *Besser v. Joice*, 9 Or. 310.

A husband and wife can enter into no contract or agreement with each other that will bar the husband's right of curtesy in the wife's real property, or that will clothe her with power or authority to dispose of her property by will freed from the husband's rights as tenant by the curtesy: B. & C. Comp. § 5234; *House v. Fowle*, 20 Or. 163 (25 Pac. 376); same case, 22 Or. 303 (29 Pac. 891); *Jenkins v. Hall*, 26 Or. 79, 85 (37 Pac. 62); *Linton v. Crosby*, 54 Iowa, 478.

2. It appears from appellant's amended bill in this case that Mary Biggers in her will made no provision for her husband in any manner, so that respondent was not called upon to elect whether he would take under the will or as tenant by the curtesy in his wife's separate real property: *Allen v. Boomer*, 82 Wis. 364 (52 N. W. 426).

MR. JUSTICE BEAN delivered the opinion of the court.

On September 12, 1904, the defendant commenced an action at law against the plaintiffs to recover possession of certain real property in the City of La Grande, alleging that he was the owner of a life estate therein, and entitled to its immediate possession. The plaintiffs answered at law, and at the same time filed a complaint in equity in the nature of a cross-bill, in which they alleged facts which they insist make them the owners in equity of the defendants' interest in the property, and estop him from asserting any claim thereto. A demurrer to the cross-bill was sustained, and, plaintiffs refusing further to plead, it was dismissed, and they appeal.

The facts as disclosed by the cross-bill are, briefly, that Mary Biggers, the wife of the defendant, died on June 30, 1903, seised and possessed of the property in dispute, leaving a will by which she devised the same to the plaintiff Hattie McCrary, and appointed the defendant as the executor thereof; that thereafter the will was regularly admitted to probate, and the plaintiffs, by the consent of the defendant, entered into possession of the property; that defendant, it is alleged, ought not to be permitted to claim or set up any interest in or right to the property, for, at the time the will was executed, the testator was suffering from a serious malady requiring a surgical operation; that she was informed by her physicians of the character of her disease, and of the probability of a fatal result of the operation; that she was desirous in case of her death that her property should go to her parents and her brother and sister, the plaintiff Hattie McCrary; that with the consent of her husband, the defendant, she could and would have transferred her property to her relatives by conveyances or other proper means, but was advised and induced by the defendant to believe that she could accomplish the same purpose by a last will and testament; that defendant represented to her that he was possessed of ample means in his own right, and did not need or desire any part of her property or the use thereof, and should not be considered at all in her will; that he advised and counseled her to omit from her will any provision for him in lieu of curtesy or otherwise, and represented to her that he would respect and carry into effect and operation any provisions of her will for the disposition of her property that she might make; that, relying upon such statements and representations and agreement of her husband, she made and executed her will, whereby she devised the real property in question to her sister; that after her death the defendant had the will probated, and was duly appointed executor thereof; that as such executor he put the plaintiffs in possession of the property, and thereby recognized their right to such possession.

From these facts it appears that Mrs. Biggers and the defendant her husband were seised in her right at the time of her death of an estate of inheritance in the land in dispute, and

therefore the defendant is entitled to the possession of such land during his life as tenant by the curtesy, notwithstanding her will (B. & C. Comp, §§ 5544, 5547), unless he has become, in some manner known to the law, barred thereof. It is not alleged or contended that he ever executed any conveyance or instrument jointly with his wife or otherwise, which has such an effect. As we understand the plaintiff's position, it is that the defendant and his wife entered into an oral contract or agreement at the time the will was executed by which he agreed to relinquish or surrender his curtesy interest in her property, and that she made her will relying thereon. The gist of this contention is that by such contract or agreement the defendant clothed his wife with power and authority to dispose of her property free from his curtesy interest. Now, it has been held by this court that, when a husband or wife owns property in his or her own right, any inchoate right the other may have therein, such as tenant by the curtesy or by dower, cannot be the subject of a valid contract between them. It was so held in *House v. Fowle*, 20 Or. 163 (25 Pac. 376), and again in *Potter v. Potter*, 43 Or. 149 (72 Pac. 702). The contract, therefore, between the defendant and his wife for the relinquishment by him of his curtesy estate or interest in her property was void, and, of course, cannot be specifically enforced.

2. Nor, under the facts as stated, is he estopped from asserting such interest. His wife did not change her position in any way to her injury by reason of his representations or agreement. She could not have barred his curtesy by any means in her power, and therefore any statements or representations he may have made to her and any instruments she may have made in reliance thereon, could not estop him from asserting his legal rights. And the fact that he permitted the plaintiffs to go into possession of the property is of no consequence. The court will not enforce specific performance of a contract for the transfer of real property on the ground that one of the contracting parties has taken possession thereof, when, as in this case, the contract is itself void and incapable of being enforced. The contract between the defendant and his wife for the relinquishment of his curtesy interest in her property was, as we have seen, void

as against public policy, and could not become valid by the plaintiffs' taking possession of the property. Nor does the fact that the will was admitted to probate on petition of the defendant, and his appointment as executor, operate as an estoppel against him. He does not claim to hold under the will, but independently of it, and the will could and did not devise his interest in the property as tenant by the curtesy.

It follows from these views that the decree of the court below must be affirmed, and it is so ordered. **AFFIRMED.**

Argued 11 April, decided 22 May, rehearing denied 3 July, 1905.

JENNINGS v. FRAZIER.

80 Pac. 1011.

TRIAL BY COURT—NECESSITY OF FINDINGS ON MATERIAL ISSUES.

1. Where an action at law is tried without a jury, it is the duty of the court on its own motion to make findings of fact covering all the material issues made by the pleadings.

FINDINGS ON INTERMEDIATE ISSUES.

2. Where either party desires findings on issues made by the evidence outside the pleadings, but deemed important for a presentation of the questions involved, the proper practice is to request the court to make such findings; and, without such a request, error cannot be predicated on its failure to do so.

For example: Where plaintiff alleged that a sale by defendant to the garnishees and the purchase by them was not bona fide, but was made in trust to defraud creditors, which was denied, and the court found that the sale was bona fide, without notice, and passed title, it substantially covered the issue, and, unless by special request, it was not the duty of the court to find as to whether the sale was made to defraud plaintiff, or whether the buyers were put on notice, or whether there was a valuable consideration, those all being minor points included within the general findings made.

FINDINGS ON ADMITTED ISSUES.

3. It is not necessary for a court to make findings covering facts admitted by the pleadings.

FRAUDULENT SALE—KNOWLEDGE OF VENDEE.

4. In order to avoid a sale of chattels on the ground of fraud, the vendee must have had notice of the vendor's fraudulent design.

FILING COST BILL PREMATURELY—NEW TRIAL.

5. If a judgment was prematurely entered, because entered the last day of term—the same day the findings were filed—it did not deprive a party of his right to file a motion for a new trial.

EFFECT OF NOT SERVING COST BILL.

6. Failure to serve the cost bill on the unsuccessful party before taxing costs is no ground for a reversal, the remedy being a proceeding in the trial court to correct the taxation.

From Multnomah: MELVIN C. GEORGE, Judge.

Action in support of a garnishment by O. O. Jennings against Wm. Frazier and others, resulting in a judgment for the garnishees, from which plaintiff appeals. **AFFIRMED.**

For appellant there was a brief over the name of *Bronaugh & Bronaugh*, with an oral argument by *Mr. Jerry England Bronaugh*.

For respondents there was a brief and an oral argument by *Mr. John Hicklin Hall*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is a proceeding by garnishment against Frazier & McLean to subject certain property in their possession, formerly belonging to the defendant Seed, to the payment of a judgment recovered by the plaintiff against Seed. It is averred in the allegations that on June 11, 1904, plaintiff commenced an action against Seed to recover money, and that such proceedings were thereafter had in such action that on November 3, 1904, a judgment was duly rendered in his favor and against Seed for \$5,000; that an execution was immediately issued thereon, and, together with a notice of garnishment, served upon Frazier & McLean, to which they made answer that they had no property in their possession or under their control belonging to Seed, except two sets of harness, but that they had on the 29th of October previously purchased of him one horse, three buggies, and one old wagon. It is then averred:

"That said pretended sale and purchase was not bona fide, but was and is wholly void, because the same was made by said J. S. Seed to said Frazier & McLean in trust for said Seed, and for the purpose of hindering, delaying, and defrauding this plaintiff in the collection of his said debt, and said sale and transfer has hindered, delayed, and defrauded this plaintiff in the collection of said debt, which facts were well known to said Frazier & McLean at the time of said pretended sale and purchase; that said Seed is insolvent, and it is necessary, in order to satisfy said judgment, that said sale be set aside * *."

It is also alleged that the value of the property alleged to have been purchased by Frazier & McLean was \$600. The answer is a general denial of the averments of the allegation. A trial was had without a jury, and the court found:

"First, That the sale of the horse and other personal property made by J. S. Seed to Frazier & McLean was a bona fide sale, without notice, and passed the title of said property to said Frazier & McLean.

"Second. That at the time of the service of the garnishment upon Frazier & McLean by the sheriff of Multnomah County, as alleged in plaintiff's allegations in this proceeding, the said Frazier & McLean had no property in their possession or under their control, belonging to the said J. S. Seed, except as returned by them in their answer to the said garnishment.

"Third. That the answer of said Frazier & McLean to the said garnishment served upon them in this proceeding on the 3d day of November, 1904, was true."

And the court deduced the following conclusion :

"That William Frazier and Ellis McLean be dismissed hence without day, and that they have judgment for their costs and disbursements."

On the same day the findings of fact and conclusions of law were filed a judgment was entered in accordance therewith in favor of Frazier & McLean for \$11, their costs and disbursements, without the service of a cost bill. From this judgment the plaintiff appeals, claiming that the court failed and neglected to find on all the material issues in the case, in that it did not find specifically whether the sale by Seed to Frazier & McLean was made by him for the purpose of defrauding the plaintiff, or whether Frazier & McLean had knowledge of facts at the time of the purchase sufficient to put them on inquiry as to Seed's intention in making the sale, if it was in fact fraudulent, or whether the sale was made for a valuable consideration.

1. Where an action at law is tried by the court without the intervention of a jury, it is the duty of the court on its own motion to make findings of fact covering all the material issues made by the pleadings, and such findings must be sufficient to sustain the judgment: *Daly v. Larsen*, 29 Or. 535 (46 Pac. 143) ; *Breding v. Williams*, 33 Or. 391 (54 Pac. 206).

2. But where either party desires findings on issues made by the evidence outside the pleadings, but deemed important for a presentation of the questions involved, the proper practice is to request the court to make such findings, and, without such a request, error cannot be predicated on its failure to do so: *Moody v. Richards*, 29 Or. 282 (45 Pac. 777) ; *Harris v. Harsch*, 29 Or. 562, 569 (46 Pac. 141).

Now, examining the pleadings in this case, it appears that the only material issue made by them is contained in paragraph three of the allegations, and is, in substance, that the sale of the property in question by Seed to Frazier & McLean, and the purchase by them, was not bona fide, but was made in trust and for the purpose of hindering, delaying and defrauding the plaintiff in the collection of his debt. This allegation is denied, and the issue thus presented was the only point in controversy in the case; and the court found from the evidence that the transaction was a bona fide sale, made without notice, and passed the title to the property to Frazier & McLean. This finding substantially covered the issue made by the pleadings. The plaintiff having averred that the purchase was not bona fide, but was intended as a transfer of the property to Frazier & McLean in trust for Seed, with the purpose of defrauding the plaintiff, the finding of the court negating this view sufficiently covers the issue as fully as was required under the pleadings. If the plaintiff desired specific findings on the questions of fact going to determine the ultimate question whether the sale was bona fide and in good faith, he should have requested it. The only material finding he requested was that the sale was not bona fide, and it was in substance in the language of the allegation. The other findings requested were immaterial.

3. The averments in respect to the commencement of the action by the plaintiff against Seed, the recovery of a judgment therein, the issuance of execution thereon, and its service upon the defendants, and the return thereto, were admitted, and no findings were necessary: *Luse v. Isthmus T. Ry. Co.* 6 Or. 125, 130 (25 Am. Rep. 506); *Moody v. Richards*, 29 Or. 282 (45 Pac. 777).

4. It is also claimed that there was a total failure of evidence to sustain the findings as made, but in this counsel is in error. There seems to have been no direct evidence offered that the sale was made by Seed to hinder or defraud the plaintiff, nor is there any testimony to show that Frazier & McLean had notice of such a purpose on the part of Seed if it existed; and this would be necessary to avoid the sale, even though he made it with such a design: *Lyons v. Leahy*, 15 Or. 8 (13 Pac. 643, 3 Am. St. Rep.

133). Frazier testified that on the 29th of October, five days before the service of the garnishment process, Seed came to him at the barn of Frazier & McLean, where he had kept his horse and buggies for some time, and said that he wanted to sell them, and was willing to take \$300 therefor; that he (witness) was engaged in the business of buying and selling such property, and, considering it worth the amount stated, he purchased it in the usual course of business, giving a check therefor, which check, marked "Paid," with Seed's indorsement, was offered and received in evidence; that after the purchase he and his partner immediately took possession of the property, and thereafter used it regularly in their business, hiring it out to their patrons. This testimony is corroborated by Dr. McLean, and is entirely uncontradicted. So there was evidence sufficient to support the findings.

5. It is contended that the judgment was erroneously entered the same day the findings of fact and conclusions of law were filed, and that the costs and disbursements were taxed without a copy of the cost bill having been served upon the plaintiff. It is suggested in one of the briefs that the findings of fact and conclusions of law were made and filed on the last day of the term, and the statute would seem to require that judgment shall be rendered during the term at which the findings and conclusions are filed: B. & C. Comp, § 201. But however this may be, if the judgment was prematurely entered, it did not deprive the plaintiff of his right to file a motion for a new trial: *Arrigoni v. Johnson*, 6 Or. 168.

6. The failure to serve the cross-bill, if service is required by the statute, will not justify a reversal of the judgment. Plaintiff's remedy was by some appropriate proceeding in the court below to correct the taxation of costs.

The judgment will be affirmed.

AFFIRMED.

Decided 29 May, 1905.

EX PARTE EASTHAM.

80 Pac. 1057.

DISBARMENT OF ATTORNEYS.

In order to justify the disbarment of an attorney, his conduct must have been such as to evidence his unfitness for that confidence and trust which attend the relation of attorney and client and the practice of law before the courts, or it should show such lack of personal honesty or of good moral character as to render him unworthy of public confidence.

Disbarment proceeding against Henry C. Eastham, resulting in an acquittal. DISMISSED.

For relators there was an oral argument by *Mr. Milton W. Smith.*

For the accused there was an oral argument by *Mr. William Smith.*

PER CURIAM. This is a proceeding instituted in pursuance of certain charges of unprofessional conduct made against the defendant by Lulu B. Currey. As formally preferred in this court, they are, in substance, that the defendant was employed by Mrs. Currey as an attorney to examine the title to certain lands that had been sold under foreclosure proceedings, she having in view the purchase of the sheriff's certificate of sale, and to advise her whether any liens, by way of judgment or otherwise, existed, affecting them, not precluded by the foreclosure; that in pursuance of such employment he examined the title, and advised her that there were no such liens, and that, relying thereon, she completed the purchase; that, notwithstanding his advice and instructions, there existed in fact a judgment lien against the premises, of which the defendant had knowledge, which judgment he subsequently purchased, and, by taking an assignment in the name of another, threatened execution, and compelled her to pay a sum largely in excess of the amount he paid for the same. A large amount of testimony has been taken and submitted, but, from the conclusions we have reached, it will only be necessary that we advert to it in a summary way.

From the defendant's admissions made to members of the Grievance Committee of the Oregon Bar Association, it must be conceded, we think, that he was employed by Dr. H. E. Currey, the husband of Mrs. Currey, to ascertain whether any liens

existed against the title to the premises, a sheriff's certificate of sale to which he then intended purchasing, and which he afterwards concluded, but took the assignment in the name of his wife, the complainant. The defendant says, however, that such was not his real employment, but that he was only to advise and assist him in securing the transfer, and that subsequently he was requested to determine, from the judgment roll, whether the foreclosure proceedings would carry title to the water rights supposed to be involved. The fact that Dr. Currey was but an agent in the employment by his wife was unknown to the defendant until the transfer was about to be closed. There is no evidence that the defendant acquired knowledge of the fact of the existence of the judgment through the course of his employment. His testimony is to the contrary; that is, that he came into possession of such knowledge some time after the transactions were had relative to the purchase of the sheriff's certificate, from an outside source entirely, and by consulting the records he verified the truth of it. This is the best information we have upon the subject, and the correctness of it is reinforced by the further admissions of the defendant to members of the grievance committee that when he ascertained about the judgment he purchased it for \$100, with a view and intention at the time of turning it over to Mrs. Currey for just what it cost him. He took the assignment, however, in the name of another, which fact is calculated to shadow somewhat his avowed intentions; but it could scarcely overcome his apparently candid statements to the grievance committee, which were induced and verified by a thoroughly searching examination. Taking the fact to be that he ascertained the existence of the judgment from outside sources, that he verified the information by a search of the records, and that he purchased the judgment, intending in good faith to turn it over to Mrs. Currey for the sum he paid for it, we can draw but one inference, which is that he, by lack of proper diligence or by oversight, failed to find the judgment, and erroneously, not willfully, advised his client with reference to the status of the title to the land she was about to purchase. At the best, there is not sufficient in this to show that he was informed of the judgment at the time he advised

with Mrs. Currey, and that he willfully concealed the fact, with a view and purpose of making gain out of the transaction by purchasing and enforcing the judgment.

Subsequent to or about the time of his purchase some trouble arose between him, or the firm with which he was connected, and Dr. Currey, relative to an account for services that the firm had rendered him; and further than this, other trouble arose between the defendant personally and Dr. Currey, superinduced by the latter circulating false and scandalous reports about the defendant, derogatory to his personal character, claimed to have been based upon information obtained through professional employment as a physician, who at the same time demanded of defendant an exorbitant sum for his services, and threatened to enforce the demand by a further exposure of the defendant. These things the defendant, in effect, says so annoyed and enraged him that he was driven to enforce the judgment for the purpose, first, of compelling payment of his firm's claim; and, second, of counteracting the exorbitant demand that Currey was seeking to have him pay. Execution was accordingly issued, and \$350 realized upon the judgment. Subsequently Mrs. Currey sued the firm with which defendant was connected for neglect of duty in the examination of the title in question, and a settlement was, we gather from defendant's testimony, finally had with Currey, which may or may not have included the money received on the judgment. We infer, however, that it did, but Currey's bill for professional services was never paid; he having in the mean time wickedly defamed the defendant, and maligned and traduced his character.

Such is the substance of the controversy, and the position of the defendant with relation to it. Does it convict him of unprofessional conduct, such as should disbar him from further practicing in the courts of justice? To suffice for that purpose, his conduct must have been such as to evidence his unfitness for that confidence and trust which attend the relation of attorney and client, and the practice of law before the courts, or it should show such lack of personal honesty or of good moral character as to render him unworthy of public confidence: 3 Am. & Eng. Enc. Law (2 ed.), 302. Finding that he had erred in his advice

through lack of knowledge, attributable to his oversight, the motive that induced him to purchase the judgment—that is, to turn it over to Mrs. Currey for what it cost him—was not an unworthy one—and, had he carried out his purpose, the affair would probably have been satisfactorily adjusted, and no one's honor have been impugned. But it was about this time that developments led to hot blood between the defendant and Currey, and the retaliatory measures resolved upon, culminating in the defendant's collection of \$350 on the judgment. It seems certain that Eastham has not availed himself of knowledge obtained through his employment for his personal profit and gain, in violation of the trust and confidence reposed in him as an attorney. What knowledge came to him later he eventually made use of for another purpose—that of inducing Currey to deal right with him. While we are not to justify such a course in legal ethics, it is but natural and human for a person to show some mettle when attacked in such an unmanly and unwarrantable manner. His was not such conduct, however, as renders him unworthy of that confidence and trust that should attend the relation of attorney and client. Nor does it stamp him with such a lack of honesty and good morals as to render him unworthy as a practitioner at the bar. He seems, in the end, after the settlement of September, 1900, when the civil action instituted by Mrs. Currey against the firm was adjusted, to have retained nothing that might be considered unconscionable or dishonorable, so that, in view of the entire record, we conclude that the defendant should be exonerated and the charges dismissed, and such will be the order of the court.

CHARGES DISMISSED.

Argued 30 March, decided 29 May, 1905.

POWERS v. POWERS.

80 Pac. 1053.

APPEAL IN EQUITY CASES—EFFECT OF FINDINGS OF TRIAL JUDGE.

1. Under B. & C. Comp. §§ 406 and 555, an equity appeal is tried in the supreme court on the transcript and the evidence, and a decree rendered accordingly, without reference to the findings or conclusions made by the trial court.

DEED—EVIDENCE OF FRAUD—CARELESSNESS.

2. A deed cannot be avoided on the ground of fraud where the evidence as to the preparation and execution of the instrument is conflicting, and the grantor was in full possession of her faculties unimpaired by disease, and was competent to transact business, particularly where the grantor signed the paper without reading it or inquiring as to its contents.

AVOIDING DEED FOR FRAUD—RELATIONSHIP OF PARTIES.

3. A deed from a parent to a child is not void merely because of the relationship of the parties.

AVOIDING DEED FOR LACK OF CONSIDERATION.

4. Inadequacy of price, though a badge of fraud, is not alone a ground for setting aside a deed.

AVOIDING DEED IMPROVIDENTLY MADE.

5. The fact that a deed by a mother to a son was improvident or unwise is not a reason for setting it aside, though it might have some weight in connection with other circumstances.

From Linn: GEORGE H. BURNETT, Judge.

Statement by MR. JUSTICE BEAN.

This is a suit by Mary Ann Powers against S. B. Powers to set aside for fraud a deed executed and delivered by the plaintiff to the defendant on February 11, 1890. The plaintiff in her complaint alleges that she is the wife of one W. M. Powers and the mother of the defendant; that on February 11, 1890, she was, and still is, the owner of and in possession of the premises described in the deed in question, and that they are of the value of \$7,000; that for some days prior to the date mentioned, and for many days thereafter, her husband was very ill and his life despaired of; that during such time the defendant, for the purpose of overreaching, wronging and defrauding her, falsely and fraudulently represented that his father was indebted to him in a large sum, the exact amount of which he was unable to state, and that if he died he would lose the amount due him, and urged and importuned her to sign a written statement to the effect that if his father died she would see him fairly treated in the settlement of the estate; that relying on such statement, and believing it to be true, she agreed to sign the statement requested; that, to carry out his purpose of overreaching and defrauding her,

defendant caused a deed to be prepared, conveying the property to him in fee simple, and falsely and fraudulently represented that it was the written statement which she had agreed to sign; that relying upon such representations, and trusting in her son, she signed the deed without reading it or knowing its character, believing it to be such statement; that defendant thereupon took possession of the deed, and secretly held the same until August 8, 1902, when he caused it to be recorded; that she has remained in the possession of the property since the execution of the deed, receiving and enjoying the rents and profits thereof; that at the time of its execution the defendant's father was not indebted to him in any sum whatever, and all the statements and representations in reference thereto so made by the defendant were and are false and untrue, and were made for the purpose of over-reaching and defrauding plaintiff. The defendant in his answer denies in toto the material allegations of the complaint, and avers that, at the request of plaintiff and his father, he worked and labored on the land owned by them for a period of about eight years, for which services they agreed to pay; that on or about the 8th day of February, 1890, he had an accounting and settlement with the plaintiff, wherein it was ascertained and agreed that she and his father owed him for such work and labor about \$3,000; that the deed in question was executed and delivered in payment thereof, it being understood and agreed, however, that plaintiff should have the use and occupation of the premises and enjoy the rents and profits thereof so long as she lived, but by mistake such reservation of a life estate was omitted from the deed, and the answer asks to have it reformed accordingly. The reply denied the material affirmative allegations of the answer, and, upon the issues thus joined, the cause was tried and a decree entered reforming the deed as prayed for by the defendant, but otherwise dismissing the complaint. From this decree the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Hewitt & Sox* and *John James Whitney*, with an oral argument by *Mr. Henry Harrison Hewitt* and *Mr. Whitney*.

For respondent there was a brief over the names of *Myron Edwin Pogue* and *Percy R. Kelly*, with an oral argument by *Mr. Pogue*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. Much of appellant's brief is devoted to a discussion of the question whether the findings of fact of the trial court are supported by the evidence. Under our statute, on an appeal from a decree in a suit in equity, the cause is tried de novo upon the transcript and evidence accompanying it, and a final decree rendered here, without reference to the findings or conclusions of the trial court: B. & C. Comp. §§ 406, 555; *Gentry v. Pacific Livestock Co.* 45 Or. 233 (77 Pac. 115). It is unnecessary, therefore, to examine the findings seriatim to determine whether they are in accordance with the testimony. It is sufficient to state generally our conclusions.

2. The plaintiff and defendant are mother and son. It is admitted, because not denied, that about the time the defendant became of age his father was considerably in debt, and it was agreed between them that if he would remain at home on the farm and help pay off the debt he should have 80 acres of land adjoining that in controversy. He worked two or three years, but became discouraged because the debts were not being paid off, and, when he attempted to talk to his father about the matter, the latter became angry and ordered him to leave. He decided to do so, and so advised his mother, who told him that as his father was sick and the other children were small, she could not get along without him, and, if he would remain and "see them through," she would see that he was paid for his labor. Thereupon he took charge of the farm, consisting of about 360 acres, managed and cultivated it for about five years until his brothers became large enough to take care of things, when he went away to work for himself. During the time he was at work on the place he was not paid anything for his services, except a small amount for spending money occasionally; and when he worked for the neighbors his wages were collected and used by his father. So far there is practically no dispute in the testimony, but there is a serious controversy concerning the making of the deed sought to be canceled and set aside.

The defendant contends that it was made by his mother voluntarily in payment for the amount due him for labor and services as stated. She claims, on the other hand, that she did not intend to execute a deed, but only to sign a written statement that in case of his father's death she would see that he was paid for his services from the estate. The plaintiff and defendant are practically the only witnesses who testify about the matter. The scrivener who drew the deed and before whom it was executed, and the subscribing witness thereto, have no particular recollection of the transaction. The plaintiff testifies that in the spring of 1890 the defendant returned from his work on the railroad; that his father was very sick at the time, and it was not expected that he would long survive; that defendant complained about having never received any pay for his work on the farm, and seemed to imagine that he would not be paid if his father died; that she told him that if anything happened to his father she would see that he was treated right in the settlement of the estate, and would sign a written statement to that effect; that on the day the deed was executed she told him that she had to go to Albany on business, and was ready to execute the paper as stated; that after arriving in town, while she was doing some shopping, the defendant came to her and told her that if she would go to Redfield's office she could sign the paper as agreed upon; that she went to the office, and there signed a paper which had already been prepared, and which she supposed was the written statement; that it was not read to her, nor did she make any inquiry as to its contents, or endeavor to ascertain whether it was as agreed or not; that no representations on the subject were made to her at the time; that it was taken possession of by the defendant, and she never saw it afterwards, and first learned that defendant claimed an interest in the place a short time before this suit was commenced.

The defendant flatly contradicts this testimony, and says that he came home from the railroad and remained during the winter of 1889-90, and took charge of things as usual; that one day his mother said to him that she wanted him to take her to Albany, as she desired to make him a deed to the place, because he had never received anything for his work, and she could not die easy

without knowing that he had been paid; that they talked the matter over at some length, and he told her that if she deeded the place to him he would never take it away from her, but she and his father should have it for a home as long as they lived; that he never asked her to make the deed, but she voluntarily offered to do so; that at her request they went to Albany, and she had Redfield prepare the deed, and she signed it, and it was delivered to him; that he did not ask Redfield to make the deed, but it was almost prepared when he came into the office; that he and his mother talked over at the time the consideration which should be named in the deed, and it was agreed that the amount due him, with interest, was about \$3,000, and that amount was inserted in the deed; that she was to remain in possession of the land during her lifetime; that she did not want the deed recorded, because she said it would make trouble between herself and her husband, and he agreed not to record it, and would not have done so had the plaintiff not attempted to sell the land.

Upon this state of the testimony a court of equity cannot cancel and annul the deed in question; whatever the moral aspect of the case may be. There is no sufficient proof of fraud or undue influence to justify it in so doing. The plaintiff was in full possession of her mental faculties at the time the deed was executed, and fully competent to transact business. Her testimony in relation to the transaction is uncertain and indefinite, and is flatly contradicted by the defendant. Out of all the contradiction and confusion, however, stands the deed, solemnly executed by her, conveying the property in question to her son. From her own testimony she was negligent and careless in signing it without reading or having it read to her or making some inquiry as to its contents. There is no testimony that the defendant made any representations to her at the time as to the nature or character of the instrument, or that he attempted or endeavored to deceive her in any way. There is no proof that he caused the instrument to be prepared, or that it was prepared at his suggestion. Its execution was not induced by any fiduciary or confidential relation between the parties, nor by reason of any special relation of trust or confidence.

3. The mere fact that they were mother and son would not be sufficient to avoid the deed, although it might demand a closer inspection of the testimony than if the transaction had been between strangers. There is no evidence of any special confidential relation between the plaintiff and her son, nor that she particularly relied upon him in any way. He had not been living regularly at home for about three years before the execution of the deed, and the farm had been managed and the business thereof transacted by other parties.

4. Nor is the purchase price so inadequate as to afford ground for relief. The amount due the defendant for labor and services was shown to have been about \$3,000, while the fee of the land was worth \$6,400. But as plaintiff was to retain the use and occupation thereof during her lifetime, it is doubtful whether the reversion was worth more than the amount due the defendant. Mere inadequacy of consideration is not a ground for avoiding a deed, although it may be evidence of fraud in connection with other circumstances sufficient for that purpose.

5. It is also immaterial that the transaction may have been unwise on the part of the plaintiff, or even improvident. She was in a position to act and judge for herself, and unless the proof shows that she was deceived by her son in substituting one paper for another, which does not appear, she fully understood, or could by the exercise of ordinary care have understood, the nature of the transaction and the character of the instrument she was signing.

It is insisted that there is no sufficient allegation in the pleadings to support the decree reforming the deed so as to vest a life estate in the plaintiff. Perhaps this would be true if this were a suit for that purpose, but the decree in that regard is in favor of the plaintiff, and she cannot complain if the defendant is satisfied therewith.

It is also urged that the court erred in admitting in evidence the deposition of a Mrs. Allen, but that question is immaterial, because without the testimony of Mrs. Allen the decree would have to be affirmed.

The decree of the court below will be affirmed. **AFFIRMED.**

Decided 3 July, 1905.

STATE v. MILLER.

81 Pac. 363.

APPEAL—BILL OF EXCEPTIONS.

1. A decision that a juror challenged for actual bias is competent may be reviewed on appeal, even though all the evidence as to his competency is not incorporated in the bill of exceptions, if the bill contains sufficient testimony to show that the juror was disqualified: *State v. Tom*, 8 Or. 177, distinguished.

JURORS—ACTUAL BIAS.

2. In a prosecution for murder, a juror who testifies that he was present in court at a former trial, heard part of the testimony, and talked with some of the witnesses, and formed a fixed and positive opinion, which it would require a good deal of evidence to remove, as well as a juror who served at the former trial and witnesses who had testified therein, and who had talked with jurors who served at the former trial and witnesses who had testified therein, and who states that he has formed an opinion which it would require strong testimony to overthrow, is incompetent for actual bias, under B. & C. Comp. §§ 121, 123, defining actual bias, and providing that an opinion shall not of itself be sufficient to sustain a challenge, but that the court must be satisfied from all the circumstances that the juror cannot disregard the evidence and try the issue impartially: *State v. Brown*, 28 Or. 147; *State v. Morse*, 85 Or. 462, and *State v. Armstrong*, 43 Or. 207, distinguished.

From Harney: MORTON D. CLIFFORD, Judge.

George S. Miller appealed from a conviction of murder in the second degree.

REVERSED.

For appellant there was a brief over the name of *Weatherford & Wyatt*, with an oral argument by *Mr. James K. Weatherford*.

For the State there was a brief over the names of *Andrew Murray Crawford*, Attorney General, *J. W. McCulloch*, District Attorney, and *Lionel Richard Webster*, with an oral argument by *Mr. Crawford* and *Mr. Webster*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. The defendant, George S. Miller, was jointly indicted with James Colwell and Bert Baily for the murder of Joseph Warren Curtis, and, having been separately tried, he was convicted of murder in the second degree, and appeals from the judgment which followed, assigning as error, inter alia, the action of the court in denying challenges for actual bias interposed to certain persons called as jurors. It is maintained by counsel for the State, however, that the bill of exceptions does not show that all the testimony given by such persons as to their qualifications is included in the transcript, and hence the question sought to be

reviewed is not brought up for consideration. In *State v. Tom*, 8 Or. 177, it was held that, where the decision on the trial of a challenge of a juror for actual bias is assigned as error, this court will not revise the determination unless it appears from the transcript that all the evidence adduced at such trial is incorporated in the bill of exceptions. An examination of that case will show that one George Klum was called as a juror, and, having been challenged for actual bias, testified on his voir dire as therein set out. We have inspected the transcript in that case on file in this court, which, in addition to the testimony quoted in the opinion, is as follows:

"That said juror was submitted to the court, and the court announced that he was satisfied from all the circumstances of the case that the juror could disregard any opinion he had, and refused to sustain the defendant's challenge, but ruled that said George Klum was a competent juror to sit in said cause; to which ruling of the court the defendant by his counsel then and there excepted."

The answers of the juror as quoted in that case and the action of the court in determining his qualification, as herein specified, constitute the entire bill of exceptions relating to his examination. It is not to be supposed that the court, without further examination, arbitrarily decided that Klum was a qualified juror after he had testified "that he had a fixed opinion as to the guilt or innocence of defendant; that it would take evidence to remove such opinion; that it was founded upon what he had read in the newspapers touching the accusation, and upon statements made to him by persons who professed to detail the facts": *State v. Tom*, 8 Or. 177. The juror in that case was undoubtedly examined further concerning his qualifications, and from the testimony given the court must have determined that he could disregard the opinion he had formed, and impartially try the issue involved. As the bill of exceptions in that case did not purport to contain any of the evidence tending to show that the opinion which the juror had formed could be ignored, and as the testimony given by him did not necessarily show that he was disqualified, no other conclusion could have been reached than that announced.

The trial of a challenge for actual bias is not like the consideration of a motion for a judgment of nonsuit, which requires that the case should not be taken from the jury if there is any evidence, inference or presumption reasonably tending to support the plaintiff's theory of the case as disclosed by his pleadings. The granting or denying of such a judgment will not be reviewed unless the bill of exceptions conclusively shows that it contains all the testimony introduced at the trial prior to the interposition of the motion. This is so because the right to such a judgment does not depend upon the preponderance of the evidence, but upon the absence of any testimony necessary to support a material issue. A challenge for actual bias involves a question of fact relating to the qualification of the person called as a juror, and the issue raised is to be determined from the preponderance of the testimony tending to prove either the impartiality or the prejudice of such person. When it satisfactorily appears from the examination of a person called as a juror that he possesses such a state of mind that he cannot try the issues impartially, the introduction of any further testimony would be superfluous. So, too, when a bill of exceptions contains sufficient testimony, taken at the examination of a juror challenged for actual bias, conclusively to show that he is disqualified, any evidence in excess thereof must necessarily be useless.

The statement of this principle is not intended to contravene the legislative declaration that in the trial of a challenge for actual bias, although it should appear that the juror objected to had formed or expressed an opinion upon the merits of the case from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied from all the circumstances that the juror cannot disregard such opinion, and try the issue impartially: B. & C. Comp, § 123. Nor must the statute adverted to receive such a liberal construction as to nullify the fundamental law of this State, which, so far as involved herein, is as follows: "In all criminal prosecutions the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed": Const. Or. Art. I, § 11. Considering the qualifications of the persons challenged for

actual bias, the question to be determined is whether or not the testimony given by them shows that they were such jurors as are guaranteed to an accused in a criminal action. Actual bias, as defined by our statute, is the existence of a state of mind on the part of the juror in reference to the action or to either party which satisfies the trier, in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging: B. & C. Comp. § 121. In prescribing the mode of determining the continuance of such a predisposition that disqualifies a person from acting as a juror it is further enacted that on the trial of an objection for actual bias, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the case from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied from all the circumstances that the juror cannot disregard such opinion and try the issue impartially: B. & C. Comp. § 123.

2. The dissemination of general information as a means of conducing to human enjoyment may well characterize the present as the newspaper age. A general demand for knowledge of current events gives rise to the publication of news. This necessitates the employment of alert correspondents in every section of the country, who industriously seek for interesting facts, put them into readable shape, and transmit them to the newspapers by which they are engaged. The perusal of these facts by thinking persons necessarily induces opinions, based on the assumption of the truth of the narration. The pioneers of this State were not able to secure many newspapers, and the few they had were read, not for pastime, but for information, and, being thinking men, their representatives in the legislative assembly, understanding the existing conditions, enacted the statute which provides that a preconceived opinion upon the merits of a cause, formed from what may have been heard or read, does not of itself necessarily render a person called as a juror partial. Upon a moment's reflection, the wisdom of this law is realized, for, if the existence of an opinion as to the merits of a cause based on what one called to try an issue may casually have heard or read

disqualified him as a juror, the trial of actions by juries would be monopolized by the ignorant, who are not interested in the world's progress, by those who would be willing to commit perjury to secure positions as jurors, and by those so weak mentally as to be unable to form conclusions from hearing or reading a statement of elementary facts.

The man who has read with care an ordinary newspaper account of an important local event, or who has heard it casually discussed by his neighbors, and who, on his voir dire examination, states that he has not formed an opinion, is either at heart a criminal, who seeks a position as a juror for a sinister purpose, or he is an imbecile, who is incapable of forming a mental conception; and in either case ought to be discharged on his mere statement that the perusal of the facts in a newspaper or the recital thereof by his neighbors produced in his mind no opinion as to the merits of the case. The nature of the opinion entertained determines the qualifications or ineligibility of the person possessing it to serve as a juror in the trial of a cause, and the quantity of evidence necessary to remove it determines its character. Newspaper accounts of important events contain a mere summary of the facts, stated in the briefest manner possible intelligently to impart the news. Though the perusal of such accounts will ordinarily create in the mind of an intelligent reader an opinion as to the merits of the cause, which requires evidence to remove, such conclusion is not usually deep or lasting, because the information on which it is based is meager: *State v. Ingram*, 23 Or. 434 (31 Pac. 1049); *State v. Kelly*, 28 Or. 225 (42 Pac. 217, 52 Am. St. Rep. 777); *State v. Olberman*, 33 Or. 556 (55 Pac. 866); *State v. Savage*, 36 Or. 191 (60 Pac. 610, 61 Pac. 1128); *State v. McDaniel*, 39 Or. 161 (65 Pac. 520); *State v. Armstrong*, 43 Or. 207 (73 Pac. 1022). So, too, the statement of such facts as a matter of news by a disinterested person necessarily creates in the mind of the hearer an opinion that is changeable in the same manner and for similar reasons.

It is possible that many related facts, subordinate to the principal inquiry, might be heard by a person in court during a trial, or outside thereof from witnesses, without creating in the mind of the hearer such a fixed and positive opinion as to dis-

qualify him from serving as a juror in a retrial of the cause. If, however, such person was in court at a former trial, and heard witnesses testify concerning the vital fact at issue, upon the truth or falsity of which the verdict necessarily depended; or if he heard such facts related by interested witnesses, whose statements he believed; or if he heard the jurors at such trial discussing the merits of the case, and from what he heard formed a fixed opinion which required evidence to remove—such person at a retrial of the cause is not an impartial juror, and when called as such, and objected to for actual bias, the challenge ought not to be controverted by opposing counsel or denied by a court. In *State v. Saunders*, 14 Or. 300 (12 Pac. 441), it is intimated that a person who had heard the testimony in any case, had read a detailed statement of it, or had been told it by some one claiming to know, was incompetent to serve as a juror. In *Kumli v. Southern Pac. Co.* 21 Or. 505 (28 Pac. 637), it is suggested that whether a person called as a juror can disregard an opinion he has formed depends in part upon the source of the information upon which such conclusion is based. In *State v. Brown*, 28 Or. 147 (41 Pac. 1042), it is argued that where a juror knows the facts involved in a cause, upon which he has formed an opinion, a challenge for actual bias ought to be sustained. In *State v. Morse*, 35 Or. 462 (57 Pac. 631), a juror on his voir dire, having testified “that he had heard a little of the testimony on a former trial, and had heard a good deal on the outside,” from which he had formed an opinion that he thought would hinder him from giving the accused a fair and impartial trial, said if he was accepted “he should certainly endeavor to try the case fairly and impartially upon the testimony of the witnesses and the law as given by the court, although he felt that his previous opinion would make it more difficult for him to do so,” was held competent. In that case the “little testimony” the juryman had heard in court on the former trial may have been unimportant, or not such as necessarily determined the cause. The “great deal” he had heard on the outside was not testimony, but hearsay, and may not have been a statement of the material facts, for in speaking of the persons whom he had heard discuss

the matter he said he "did not know whether they were witnesses or not."

In the case at bar, though the bill of exceptions shows that objections were made to several persons called as jurors, each was excused by defendant's counsel except the last, when, having exhausted all their peremptory challenges, they were compelled to accept him. We shall call attention to the testimony of only two of such persons. The judge's certificate, appended to the bill of exceptions, does not state that the entire testimony given by the persons called as jurors is included in the transcript. That it is not so incorporated is negatived by the bill of exceptions, from which the following extract is taken: "W. C. White was examined as a juror, and, among other [things] testified as follows." Here appear what purport to be replies to preliminary interrogatories, which are omitted, followed by questions and answers, from which we summarize: This person stated on his voir dire examination that he was in court at a former trial of this cause, when Mrs. Curtis, widow of the deceased, gave her testimony, but he did not know that he heard all of it, for it was difficult for him to hear what she said; that he had heard some of the witnesses who appeared at the former trial of this action detail the testimony given by them; that from what he had heard he had formed a fixed and positive opinion, which would require a good deal of evidence to remove; that, if the defendant could produce evidence to establish his guilt or innocence, he would change his opinion, but that he believed he could give him an impartial trial on the evidence which he might hear in court. B. Terrill testified on his voir dire examination that he had talked with a good many witnesses who gave testimony at the former trial of this cause, and also with some of the jurors who returned the verdict therein; that such persons detailed to him, as nearly as they could, the facts involved; that, having confidence in what they said, he had formed a fixed opinion as to the merits of the case, which would require strong testimony to overthrow, and which, to him, prevented the parties from starting on an equal race in the trial; but that, if accepted as a juror, he could lay aside such opinion, and try the case fairly and impartially. As we remember the testimony given at

the former trial (*State v. Miller*, 43 Or. 325, 74 Pac. 658) by Mrs. Curtis, who heard the fatal shots fired that made her a widow, we do not believe any person could listen to her recital of the facts without forming such an opinion as to render him biased as to the merits of the case. Nor could a person hear the witnesses or the jurors tell the story of the homicide, as it was unfolded in court, without forming such an opinion as to the guilt or innocence of the defendant as to render him prejudiced in the matter.

Other alleged errors are assigned, but deeming them unimportant, the judgment is reversed, and a new trial ordered.

REVERSED.

Decided 3 July, rehearing denied 28 August, 1905.

FOUTS v. HOOD RIVER.

81 Pac. 370; 1 L. R. A. (N. S.) 483.

TIME WHEN LOCAL OPTION LAW TOOK EFFECT—CONSTITUTIONALITY.

1. The local option law adopted in June, 1904 (printed in *Laws 1905*, pp. 41-50), providing that upon the filing of a petition of a designated kind the county court shall order an election to determine whether the sale of intoxicating liquors shall be permitted or prohibited in the political subdivisions designated in the petition, and that if the vote is against permission the prohibition shall take effect on the first day of July next succeeding, is a general act, which became a law pursuant to proclamation,* and is not within the prohibition of Const. Or. Art. I, § 21, providing that no laws "shall be passed the taking effect of which shall be made to depend upon any authority, except as provided" in said constitution, though the operation of the prohibitory feature is conditioned on the vote in the subdivisions designated by the petition.

LOCAL OPTION LAW—SPECIAL ACT PUNISHING CRIMES—REGULATING PRACTICE IN COURTS OF JUSTICE.

2. The local option law adopted in Oregon by popular vote in 1904 (*Laws 1905*, p. 41, c. 2) is not a special or local law for the punishment of crimes and misdemeanors, or regulating the practice in courts of justice, as prohibited by Const. Or. Art. IV, § 23, subds. 2 and 3.

LOCAL AND SPECIAL LAWS AS TO SALES OF LIQUORS.

3. As Const. Or. Art. IV, § 23, does not prohibit special or local laws concerning the sale of intoxicating liquors, there seems to be no limitation on the power to legislate locally on that subject, so that the local option act adopted in 1904 (*Laws 1905*, pp. 41-50) is not void because it may operate in only some districts.

From Wasco: W. L. BRADSHAW, Judge.

Action by P. F. Fouts to recover money from the City of Hood River. From a judgment as prayed defendant appeals.

AFFIRMED.

*NOTE.—The time when initiated laws become in force and effect is determined by gubernatorial proclamation: *Laws 1903*, pp. 244, 249, § 9. As to the date of the proclamation concerning the local option law adopted by the people on June 6, 1904, see *Laws 1905*, p. 50, note. REPORTER.

For appellant there was a brief and an oral argument by *Mr. John McCourt*, to this effect.

I. The Constitution of Oregon prohibits the putting of laws into effect, upon the vote of the people, except upon a vote of all the people of the State in the manner pointed out by the initiative and referendum amendment to the constitution. Therefore what is known as the local option law is void, and cannot be put into effect upon the authority of a vote in a county, subdivision of a county or a precinct: Const. Or. Art. I, § 21; Art. IV, § 1, as amended by the initiative provision.

II. Courts may examine the proceedings of constitutional conventions to ascertain the meaning of constitutional provisions: *Opinion of Justices*, 126 Mass. 557; *Wisconsin Cent. R. Co. v. Taylor*, 52 Wis. 38 (8 N. W. 833); *State v. Parler*, 52 S. C. 207 (23 S. E. 651); *State v. Norman*, 16 Utah, 457 (52 Pac. 986); *Cooley*, Const. Lim. (6 ed.), 75; and in like manner may resort to histories of the times with a view of ascertaining the objects and purposes of provisions under consideration: *People v. Potter*, 47 N. Y. 375; *Maxwell v. Dow*, 176 U. S. 531 (44 L. Ed. 597); *Fox v. McDonald*, 101 Ala. 51 (21 L. R. A. 529, 13 So. 416, 46 Am. St. Rep. 98).

III. Section 21 of Article I of our constitution was designed to prohibit the taking effect of prohibitory liquor laws upon the authority of a popular vote: Journal of the Constitutional Convention of Oregon, as published 1882, pp. 24, 27, 35, 38, 44, 52, 59, 60, 61, 66 and 77.

IV. The local option law does not take effect until it has been voted upon, and not then unless the county court makes an order putting it into effect: Local Option Law (Laws 1905), pp. 41, 43, 46, §§ 3 and 10.

For respondent there was a brief and an oral argument by *Mr. William H. Wilson*, to this effect.

The only propositions discussed by counsel for appellant in his brief which we controvert are: 1st. That Section 21, Article I, of the Constitution of Oregon, imposes a limitation in the enactment of general laws that does not apply to state constitutions generally; and, 2d. That the local option law does not take

effect until voted upon, and not then unless the county court makes an order to that effect. We submit that these are not sound propositions of law.

On behalf of respondent we respectfully submit the following points and authorities.

1. The proper construction of Section 21 of Article I of the Constitution of Oregon is the same that is given to state constitutions generally, to the effect that legislative authority cannot be delegated: *Locke*, Civ. Govt. 142; *Cooley*, Const. Lim. 163; *Arms. v. Ayers*, 192 Ill. 601 (85 Am. St. Rep. 357, 58 L. R. A. 277, 61 N. E. 851); *Dowling v. Lancashire Ins. Co.* 92 Wis. 63 (31 L. R. A. 112, 65 N. W. 738); *Bradshaw v. Lankford*, 73 Md. 428 (25 Am. St. Rep. 602, 11 L. R. A. 582, 21 Atl. 66); *State v. Weir*, 33 Iowa, 134 (11 Am. Rep. 115); *Ex parte Wall*, 48 Cal. 279 (17 Am. Rep. 425); *Willis v. Owen*, 43 Tex. 41; *Farnsworth Co. v. Lisbon*, 62 Maine, 451.

2. The local option law became a law and took effect when the same was adopted by a majority of the voters at the June, 1904, election and the result thereof was ascertained and determined: *Sutherland*, Stat. Const. 68; *Locke's Appeal*, 72 Pa. St. 495; *Weir v. Gram*, 37 Iowa, 653; *Santo v. State*, 2 Iowa, 165 (63 Am. Dec. 487); *Dalby v. Wolf*, 14 Iowa, 229; *State v. Forkner*, 94 Iowa, 1 (28 Am. St. Rep. 206, 62 N. W. 683); *Savage v. Commonwealth*, 84 Va. 619 (5 S. E. 565); *Commonwealth v. Bennett*, 108 Mass. 27; *Fell v. State*, 42 Md. 71 (20 Am. Rep. 83); *Hammond v. Haines*, 25 Md. 541 (90 Am. Dec. 77); *Garrett v. Aby*, 47 La. Ann. 618 (17 So. 238); *Anderson v. Commonwealth*, 76 Ky. 485; *Groesch v. State*, 42 Ind. 547; *Ginz v. State*, 44 Ind. 218; *State v. Wilcox*, 42 Conn. 394; *State v. Cooke*, 42 Minn. 247 (7 L. R. A. 121, 44 N. W. 7); *Paul v. Gloucester County*, 50 N. J. Law, 585 (1 L. R. A. 86, 15 Atl. 272).

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is an action by P. F. Fouts to recover against the City of Hood River a proportionate amount of plaintiff's license tax for the unexpired term for which license was issued to him to engage in the occupation of liquor dealer within the city, cut

short by an order of prohibition made under the local option act. Plaintiff had judgment, and defendant appeals.

The single question presented in this case is whether what is known as the "Local Option Act" (Laws 1905, p. 41, c. 2), initiated with and adopted by the people in June, 1904, is constitutional. It is urged by the appellant that it is not for the reason that by its terms it is made to take effect, if at all, upon the popular vote of the locality or localities within which it is sought to have it apply or become operative. This feature, it is urged, is inimical to Section 21, Article I of the Constitution of Oregon, which reads as follows (omitting the proviso): "No ex post facto law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution." The cardinal provisions of the act necessary for us to take note of now are as follows: "Whenever a petition therefor signed by not less than 10 per cent of the registered voters of any county in the State, or subdivision of any county, or precinct of a county, shall be filed with the county clerk of such county in the manner in this act prescribed, the county court of such county shall order an election to be held at the time mentioned in such petition, and in the entire district mentioned in such petition, to determine whether the sale of intoxicating liquors shall be prohibited in such county or subdivision of such county or in such precinct": Laws 1905, p. 41, § 1. "The petition therefor shall be filed with the county clerk not less than thirty nor more than ninety days before the day of election. In every county, subdivision of county, or precinct thereof, that shall return a majority vote for prohibition in November, 1904, the law shall take effect on the first day of January, 1905. In all succeeding elections, the law shall take effect on the first day of July following the day of election": Laws 1905, pp. 41, 43, § 3. Only qualified electors are permitted to vote at such elections. Ample provisions are then made for holding elections under the act. On the tenth day after any election so held the county clerk is required to take to his assistance two justices of the peace, and proceed to open the returns, and make an abstract of the vote for the information of

the county court; and the court is required on the eleventh day after the election, or as soon thereafter as practicable, to hold a special session, and, if a majority of the votes thereon in the county as a whole, or in any subdivision of the county as a whole, or in any precinct in the county, are for prohibition, it shall immediately make an order declaring the result of such vote, and absolutely prohibit the sale of intoxicating liquors within the prescribed limits, except for the purposes and under the regulations specified in the act, until such time as the qualified voters therein at a regular election held for the purpose by a majority decide otherwise, and thereafter it shall be unlawful to sell, exchange or give away any intoxicating liquor within the territory included within said prohibitory order, except as in the act provided. By section 11 (page 47) it is further provided that if a majority voting at any election held under the act vote against prohibition, the court shall make an order declaring the result, and have the same enrolled in its records. Further provision is made that after the election has been held and the result declared no subsequent election shall be held before the second calendar year thereafter, and that, when such subsequent election results against prohibition, then that the court shall enter an order setting aside the previous order enforcing it. A penalty is denounced against violations of the act.

There exist among the earlier adjudications directly opposing opinions as to the constitutionality of a statute which has been referred to the people to determine whether it shall become a law or not under constitutions vesting legislative authority merely in a legislative assembly, without other provisions qualifying or limiting such authority: *Rice v. Foster*, 4 Har. (Del.) 479; *Maize v. State*, 4 Ind. 342; *Santo v. State*, 2 Iowa, 165 (63 Am. Dec. 487); *Geebrick v. State*, 5 Iowa, 491; *Mayor v. Clunet*, 23 Md. 449; *People v. Collins*, 3 Mich. 343; *Barto v. Himrod*, 8 N. Y. 483 (59 Am. Dec. 506); *Railroad Co. v. Commissioners*, 1 Ohio St. 77; *Parker v. Commonwealth*, 6 Pa. 507 (47 Am. Dec. 480); *Bancroft v. Dumas*, 21 Vt. 456; *State v. Parker*, 26 Vt. 357; *Bull v. Read*, 13 Grat. 78. As if to set the principle at rest by explicit declaration, our constitution has provided in Section 21 of Article I: "Nor shall any law be passed, the taking effect

of which shall be made to depend upon any authority, except as provided in this constitution." Indiana has the same provision in her constitution, which has there received judicial construction, not fully, but in a measure, to the purpose that a law made to take effect or not, dependent upon the popular will or vote of the people, is inimical to the clause, as being made to take effect by dependence upon other authority than that provided in the constitution: *Maize v. State*, 4 Ind. 342. This, we take it, should be so upon principle. Under our form of government the people have delegated to the legislative assembly, the lawmaking body, the power and authority to enact laws. The legislature must itself exercise the power. It cannot delegate it to any other authority. Since the adoption of the initiative and referendum amendment to the constitution, however, the people have reserved to themselves the power to initiate an act and to adopt or reject it by popular vote, and a bill adopted by the legislature may be referred to the people for their ratification; but the mode in this instance is the measure of the power. But where an act comes from the legislative assembly it may be affirmed, we think, under the clause of the constitution above quoted that that body cannot leave it to a vote of the people to determine whether or not it shall become a law, because the taking effect thereof is thereby made to depend upon an authority other than that provided for in the constitution. The proposition seems so clear that it is unnecessary to go further with the demonstration.

The pivotal and cardinal question here is whether the present legislation has been made by the act itself to take effect—that is, to become a law—dependent upon a vote of the people. It may be assumed, as counsel for appellant asserts, that the act is general, as contradistinguished from local or special, and such appears really to be its purpose and intendment. It might be further observed, however, that the subject-matter thereof does not fall within the category of cases concerning which local or special legislation is inhibited by Section 23 of Article IV of the Constitution of Oregon. In the case of *Maize v. State*, 4 Ind. 342, a law similar in its provisions to this one was declared inimical to the Indiana constitution, but it was not on account

of the clause we now have under consideration alone, but as read in connection with another clause, which provided that, "whenever a general law can be made applicable, all laws shall be general and of uniform operation throughout the State"; the court regarding the subject as matter for general and uniform legislation, and not local or special. In a much later case from the same State (*Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185), where was considered a law providing for the submission to the people of a county or township whether a tax should be levied and an appropriation made to aid in railroad construction, and wherein was not involved the requirement that the law should be of general application, the court held it to be valid and operative, notwithstanding a contention that it was made to take effect upon an authority otherwise than as provided in the constitution. The Maize case was distinguished upon the ground that the subject there treated of was matter for general legislation, while the act then under consideration did not fall within such classification. A similar act, applying to incorporated cities, authorizing an issue of bonds to pay for subscriptions to stock of a railroad company to aid in the construction of the road upon a petition of a majority of the resident freeholders therein, had been theretofore held valid in *Thompson v. City of Peru*, 29 Ind. 305, although the act was general, the power being conferred upon all cities. By a still later case (*Groesch v. State*, 42 Ind. 547), involving a statute whereby the issuance of a license was made to depend upon securing a majority of the legal voters in the township or ward of a municipality, it was determined that the law was general, and of uniform operation throughout the State, and that it took effect by force of its enactment by the legislature, and not by authority of a majority of the legal voters in the locality where sought to be invoked. These are the Indiana cases bearing upon the question, and are noticed particularly as our constitution is the same as hers touching the taking effect of an act.

Other cases from elsewhere hold that a law similar in its provisions to the one under consideration does not take effect or become a law by reason of the popular will, but that it is a law perfect in all its parts as it comes from the hands of the legis-

lative assembly; that the election is prescribed by the law, not by the people, to determine its application and limitation; and that the expressed will of the people is but an appropriate contingency upon which the law shall depend for its operation. We cannot better state or discuss the doctrine involved than by quoting from the opinion of Mr. Justice AGNEW in *Locke's Appeal*, 72 Pa. 491 (13 Am. Rep. 716). The act there considered was by nature purely local, affecting only the twenty-second ward in the City of Philadelphia. He says: "What did the legislature, in this section, submit to the people, and what did they not submit? This is quite as clear as any other part of the act. Each elector is to vote a ticket for license or against license. He is allowed by the law to say, 'I am for the issuing of license,' or 'I am against the issuing of licenses,' and thus to express his judgment or opinion. But this is all he was permitted by law to do. He declared no consequences, and prescribed no rule resulting from his opinion. Nor does the majority of the votes declare a consequence. The return of a majority is but a mere numerical preponderance of votes, and expressed only the opinion of the greater number of electors upon the expediency or in expediency of licenses in this ward. When this is certified by the return, the legislature, not the voters, declare 'it shall (or it shall not) be lawful for any license to issue for the sale of spirituous liquors.' Thus it is perfectly manifest this law was not made, pronounced, or ratified by the people; and the majority vote is but an ascertainment of the public sentiment—the expression of a general opinion—which, as a fact, the legislature has made the contingency on which the law shall operate. When the law came from the halls of legislation it came a perfect law, mandatory in all its parts, prohibiting in this ward the sale of intoxicating liquors without license, commanding an election to be held every third year to ascertain the expediency of issuing licenses, and, when the fact of expediency or in expediency shall have been returned, commanding that licenses shall issue or shall not issue. Then what did the vote decide? Clearly, not that the act should be a law or not be, for the law already existed. Indeed, it was not delegated to the people to decide anything. They simply declared their views or wishes,

and when they did so it was the fiat of the law, not their vote, which commanded licenses to be issued or not to be issued. * * So long, therefore, as the legislature only calls to its aid the means of ascertaining the utility or expediency of a measure, and does not delegate the power to make the law itself, it is acting within the sphere of its just powers." This case overrules the earlier case of *Parker v. Commonwealth*, 6 Pa. 507 (47 Am. Dec. 480), which held to a contrary opinion.

The identical principle is aptly stated and avowed as sound by Mr. Justice WAGNER, speaking for the court, in *State ex rel. v. Wilcox*, 45 Mo. 458, 464. He says: "Now, the legislature cannot propose a law, and submit it to the people to pass or reject it by a general vote. That would, indeed, be legislation by the people. But the proposition cannot be successfully controverted that a law may be passed to take effect on the happening of a future event or contingency. The future event—the happening of the contingency, or the fulfillment of a condition—affords no additional efficacy to the law, but simply furnishes the occasion for the exercise of the power. The law is complete and effective when it has passed through the forms prescribed for its enactment, though it may not operate, or its influence may not be felt, until a subject has arisen upon which it can act. In the case we are now considering the act took effect with the other laws contained in the statutes. It was passed according to the prescribed forms designated in the constitution. Its enactment did not depend upon any popular vote, but parties to be affected by it were at liberty to accept the privileges granted, and incur the burdens and obligations it would impose, as their interest or will should dictate. If they elected not to avail themselves of its privileges, it did not in the least impair its force. It still stood a valid enactment on the statute book. If they organized under it, they were entitled to the benefit of its provisions; but in either event the law remained the same. There is no pretense, therefore, for saying that the law is objectionable because it depends for its efficacy on the vote of the people. This point must be ruled against the plaintiff in error." So, in the case of *Fell v. State*, 42 Md. 71, 85 (20 Am. Rep. 83), involving almost an identical statute with our own, it was declared

that the question was not a new one in that State; the court further saying: "Now, what has been delegated to the voters by this act of the assembly? Certainly not the power to make the law, or to repeal existing laws. They are called on by the first section simply to express, by their ballots, their opinion or sentiment as to the subject-matter to which the law relates. They declare no consequences, prescribe no penalties, and exercise no legislative functions. The consequences are declared in the law, and are exclusively the result of the legislative will. The act of assembly is 'a perfect and complete law as it left the halls of legislation and was approved by the Governor'; but by its terms it was made to go into operation in any district upon the contingency of a majority of the legal voters within the district being ascertained to be in favor of the prohibition contained in the second section. The question before us therefore resolves itself simply into this: May the legislature constitutionally enact a law, and make its operation depend upon the contingency of the popular vote?" Answering the question, it was resolved in the affirmative, and to the same effect is a more recent case in New Jersey, involving a similar act: *Paul v. Gloucester County*, 50 N. J. Law, 585 (15 Atl. 272, 1 L. R. A. 86). So, also, in Iowa: *State v. Forkner*, 94 Iowa, 1 (62 N. W. 772, 28 L. R. A. 206).

See, also, as announcing the same principle in that State, *Dalby v. Wolf*, 14 Iowa, 228, and *Weir v. Cram*, 37 Iowa, 649. Two earlier cases holding to the doctrine for which the appellant contends, are distinguished, namely, *Santo v. State*, 2 Iowa, 165 (63 Am. Dec. 487), and *Geebrick v. State*, 5 Iowa, 491. We may remark also that the case in 5 Iowa was made to turn as well upon the constitutional provision that all acts of a general nature shall have uniform operation, which it was held the act there considered did not have. For other cases in harmony with the view entertained in Locke's Appeal, see *Cincinnati R. Co. v. Clinton County*, 1 Ohio St. 77; *Boyd v. Bryant*, 35 Ark. 69 (37 Am. Rep. 6); *State v. Wilcox*, 42 Conn. 364 (19 Am. Rep. 536); *Caldwell v. Barrett*, 73 Ga. 604; *Commonwealth v. Weller*, 77 Ky. 218 (29 Am. Rep. 407); *Gayle v. Owen County Court*, 83 Ky. 61; *Commonwealth v. Bennett*, 108

Mass. 27; *Commonwealth v. Dean*, 110 Mass. 357; *State v. Cooke*, 24 Minn. 247 (31 Am. Rep. 344); *Rohrbacher v. City of Jackson*, 51 Miss. 735; *Schulherr v. Bordeaux*, 64 Miss. 59 (8 South. 201); *State ex rel. v. Wilcox*, 45 Mo. 458; *State v. Pond*, 93 Mo. 606 (6 S. W. 469); *State v. Noyes*, 30 N. H. 279; *State v. Morris Common Pleas*, 12 Am. Law Reg. (N. J.) 32; *Clarke v. City of Rochester*, 24 Barb. 446; s. c. 28 N. Y. 605; *State v. O'Neill*, 24 Wis. 149. There are cases, of which *Ex parte Wall*, 48 Cal. 279 (17 Am. Rep. 425), is perhaps the strongest, opposed to this view, it is true, but the very great weight, as the above numerous authorities will attest, is in support of it.

As the law stood at the time of the adoption of the act, no person was permitted to sell spirituous liquors in the State in less quantities than one gallon without having obtained a license from the county court of the proper county for the purpose, which provisions are without application to cities and incorporated towns. The mode prescribed for securing such license is for the applicant to procure the signatures of an actual majority of the whole number of legal voters in the precinct in which he is desirous of carrying on the business, and upon the production of such a petition and a compliance with other provisions the county court is authorized to grant the license. The cities and incorporated towns are governed in the issuance of licenses of the kind by their several charters and ordinances. All these provisions remain operative and are unaffected by the local option act, now under consideration, unless the people, by a majority vote in the precinct, ward or district involved, determine the contingency upon which the sale of intoxicating liquors shall be absolutely prohibited in such district: *Sandys v. Williams*, 46 Or. 327 (80 Pac. 642). If the vote be against prohibition, then the old law—both the general statute and the local acts and ordinances pertaining to incorporated towns and cities—remains operative; but, if for prohibition, then its operation is suspended within the district until the people again vote against prohibition, as is firmly established by the foregoing authorities. The present law, when enacted, was complete in itself, requiring nothing else to give it validity. It became effective as a law from the time of its enactment. All its provisions were then

susceptible of unrestricted operation. When the time came for 10 per cent of the voters of any authorized district to petition the county court to order an election, a way was provided and open, and so the very steps are prescribed in their regular order until an election determines the question of the expediency or inexpediency of enforcing prohibition within the district involved. The law provides for all these things, and this it did as it came from the people duly adopted. It is not the election that breathes into the act its validity or vitality. The act is complete, and an active, living force without it; but the election, as is designed, and which is constituted a part of the enginery of the law, does contribute to designate or determine the contingency upon which prohibition shall become operative or not, according to the popular will in the locality or localities where invoked. The new law is but supplementary to the old. It does not repeal or amend the old, or any portion of it, although it may suspend it for the time being, but not to eradicate it, or permanently to change its functions: *Schulherr v. Bordeaux*, 64 Miss. 59 (8 South. 201).

Suppose the two were adopted by the same statute, so that there was but one act instead of two or more, operating as an harmonious whole, would any one doubt its constitutional efficacy or validity? It then would be license if applied for in the way prescribed, or prohibition, as the popular will might determine as to the expediency or inexpediency in the premises. So it is now, and thus the matter is so simplified that none can fail to comprehend fully its operation. The wording of the act is not aptly devised, as it reads that "in every county, subdivision of a county, or precinct thereof, that shall return a majority vote for prohibition, * * the law shall take effect on the first day of January," or "the first day of July," as the case may be (Laws 1905, pp. 41, 43, § 3); but the undoubted intendment is that prohibition shall become operative or not within the territory involved, dependent on the contingency to be determined by a vote of the people concerned, and is clearly distinguishable on principle from the act which was declared invalid in the early case of *Barto v. Himrod*, 8 N. Y. 483 (59 Am. Dec. 506), because of the provision that "it should or should not become a

law," dependent upon a majority vote of the people of the State. Such an act would have been clearly inimical to our constitution, as being made to take effect upon authority other than that prescribed in the instrument itself. But not so here. The act being general, it is also such by nature as that it may have local operation, and is not inhibited, as we have before observed, by any provision of Section 23 of Article IV of the Constitution of Oregon.

2. It does not, as is suggested, provide for a different rule for the punishment of crimes and misdemeanors, nor does it in any measure regulate the practice of the courts of justice. The crime or misdemeanor prescribed or created for a violation of the prohibition order is alike and uniform all over the State, and so it is with such as are prescribed for a violation of the old law if prohibition is not ordered. The suggestion is therefore untenable.

3. But it is urged that the proviso annexed to Section 21 of Article I, indicated a different intendment than such as we are disposed to attribute thereto. After reciting, "nor shall any law be passed, the taking effect of which," etc., the section continues: "Providing that laws locating the capital of the state, locating county seats, and submitting county and corporate acts and other local and special laws, may take effect or not, upon a vote of the electors interested." The argument of counsel is based upon the fact that an amendment was proposed in the convention by inserting after the word "acts" contained in this latter clause the words "prohibitory liquor laws," and was voted down, from which he concludes that it was the intendment that no prohibitory liquor law should be made to take effect upon a vote of the people. This is true in a sense. The mover of the amendment intended no doubt to create an exception to the preceding provision so as to permit prohibitory liquor laws to take effect or not upon a vote of the people—that is, a general law providing for that, and nothing else; but as the section now stands, considered in connection with Section 23 of Article IV, there is nothing to prevent the adoption of a local or special law inhibiting the sale of intoxicating liquors within any precinct, county, ward or city in the State; and the fact that the present

law may become operative locally, and not generally, is aptly in accord with the very spirit and letter of the constitution. We have come to this conclusion after a very careful consideration of the reading of the constitution, and are convinced that its soundness is established upon principle by the vast weight of the more recent authorities. *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185, is especially instructive in this view.

With the wisdom, policy and expediency of the legislation the courts can have nothing to do. That is a matter purely and solely for another department of state—the lawmaking body, the legislative assembly—or, under the initiative and referendum amendment, for the people themselves to determine, and their determination in that regard is final and conclusive, save by an appeal to the same authority or department.

The judgment of the circuit court should be affirmed, and it is so ordered.

AFFIRMED.

Argued 12 April, decided 12 May, 1905.

HARVEY v. SOUTHERN PAC. CO.

80 Pac. 1061.

46	505
48	496
48	497

WAIVER OF MOTION TO STRIKE COMPLAINT.*

1. A motion to strike out a complaint must be made before answering, under Section 81 of B. & C. Comp., and is therefore waived by pleading over.

COMPELLING ELECTION BETWEEN CAUSES OF ACTION.*

2. Where a pleading shows double statements of the same cause of action, or different grounds of recovery for the same right, the plaintiff will usually be required before the taking of evidence begins to select one ground and abandon the others, though there are a few exceptions to this rule.

DISCRETION AS TO COMPELLING ELECTION.

3. Whether a motion to require a party to elect should be granted is largely discretionary, care being had to promote justice and truth.

PLEADING SEPARATE CAUSES OF ACTION.

4. Separate rights of action must always be separately stated, while separate statements of a single right may or may not be allowed, as the occasion may require.

This is an example of properly requiring an election between statements of a right of action: A plaintiff having stated a cause of action under the statute against a railroad company for killing stock on unfenced track, and having also stated a cause of action for ordinary negligence in killing the same stock at the same place with the same train, the court required him, before offering evidence, to select either the statutory or the common-law negligence and abandon the other.

TIME OF REQUIRING ELECTION.

5. A motion to require a party to elect which cause of action will be pursued may be made after an appeal from a justice's court and at any time before the examination of witnesses begins.

*NOTE.—See, also, *Fleischman v. Meyer*, 46 Or. 267. REPORTER.

STOCK KILLED ON TRACK—LIMITS OF STATION GROUNDS.

6. The entire space between the shortest switch connections with the main line in a railroad yard is within the yards or station grounds that need not be fenced under Section 5146 of B. & C. Comp.

From Jackson: HIERO K. HANNA, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is an action instituted by J. A. Harvey against the Southern Pacific Co. in a justice's court. The complaint states in a single count a cause of action against the defendant based upon common-law negligence in running its train upon and killing the plaintiff's cow, and another cause for not fencing its track, whereby the cow was permitted to stray thereupon, and was killed by a passing train. It was further alleged that plaintiff duly served upon the defendant a proper notice of the killing of the animal and his claim therefor, and that \$50 is a reasonable attorney's fee for the prosecution of the action. Judgment was for the plaintiff, and defendant appealed to the circuit court. The cause coming on for trial in the latter court, and after the impaneling of the jury and the opening statements of counsel, counsel for defendant filed a motion asking the court to require the plaintiff to elect upon which cause of action he would proceed to trial, which motion being allowed, the plaintiff confined his examination to the cause based upon the failure of the defendant to fence its track. At the close of the testimony the defendant moved for a directed verdict in its favor, which motion was allowed; and, judgment having been rendered accordingly for the costs and disbursements of the action, the plaintiff appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. Hayward Howard Riddell*, with a brief by *Mr. Enoch B. Dufur*, to this effect.

I. Where several causes of action have been improperly joined, the general rule is that the objection must be made by demurrer, which was not done here: *Haverstick v. Truesdel*, 51 Cal. 431; *Simpson v. Greely*, 8 Kan. 586; *Blossom v. Barrett*, 37 N. Y. 434 (97 Am. Dec. 747); *Finley v. Hayes*, 81 N. C. 368; *Field v. Hurst*, 9 S. C. 277; *Corbett v. Wrenn*, 25 Or. 311 (35 Pac.

658). Beyond a doubt it cannot be raised after no reference has been made to the matter in the answer: *White v. Delschneider*, 1 Or. 254; *Spaur v. McBee*, 19 Or. 76, 78 (23 Pac. 818); *Wilson v. Wilson*, 26 Or. 251, 261 (38 Pac. 185); *Cooper v. Thomason*, 30 Or. 161, 176 (45 Pac. 296).

II. Depot grounds means the place where passengers board and alight from the trains, and where freight is loaded and unloaded, allowing a reasonable space for such purposes: *Smith v. Chicago & N. W. Ry. Co.* 60 Iowa, 512 (15 N. W. 291); *Peyton v. Chicago, R. I. & Pac. Ry. Co.* 70 Iowa, 522 (30 N. W. 877); *Fowler v. Farmers' L. & T. Co.* 21 Wis. 78; *Dinwoodie v. Chicago, M. & St. P. Ry. Co.* 70 Wis. 160 (35 N. W. 296); *Jaeger v. Chicago, M. & St. P. Ry. Co.* 75 Wis. 130 (43 N. W. 732); *Anderson v. Stewart*, 76 Wis. 43 (44 N. W. 1091); *Moser v. St. Paul & D. R. Co.* 42 Minn. 480 (44 N. W. 530).

Whether the place where the animal was killed was within the space reasonably required for depot purposes is for the jury: *Grosse v. Chicago & N. W. Ry. Co.* 91 Wis. 482 (65 N. W. 185).

III. In communities where blocks are of ordinary size no fence is required; but where the streets are widely separated, the railroad companies must fence: *Coyle v. Chicago, M. & St. P. Ry. Co.* 62 Iowa, 518 (17 N. W. 771); *Wymore v. Hannibal & St. J. R. Co.* 79 Mo. 247; *International & G. N. R. Co. v. Dunham*, 68 Tex. 231 (2 Am. St. Rep. 484, 4 S. W. 472).

For respondent there was an oral argument by *Mr. William David Fenton* and *Mr. Rufus Albertus Leiter*, with a brief over the names of *Mr. Fenton*, *Mr. William Mason Colvig* and *Mr. Leiter*, to this effect.

1. The complaint containing two distinct acts of negligence in one count, either one of which would give a cause of action prima facie—one based on a state statute, and the other on negligence at common law, the motion to require plaintiff to elect on which cause of action he intended to rely was well taken: *Matz v. Chicago & A. R. Co.* 88 Fed. 770; *Ruff v. Columbia & G. R. Co.* 42 S. C. 114 (20 S. E. 27); *Otis v. Mechanics' Bank*, 35 Mo. 128; *Dougherty v. Wabash R. Co.* 19 Mo. App. 419; *Brown v. Kansas City, etc., R. Co.* 20 Mo. App. 429; *Offield v. Wabash R. Co.* 22 Mo. App. 607; *Kern v. Pfaff*, 44 Mo. App.

32; *Harris v. Wabash R. Co.* 51 Mo. App. 125; *Marx v. Marx*, 89 Mo. App. 455; *Brady v. Ludlow Mfg. Co.* 154 Mass. 468 (28 N. E. 901); *Kansas Refrig. Co. v. Pert*, 3 Kan. App. 364 (42 Pac. 943); *Murphy v. Russell*, 8 Idaho, 133 (67 Pac. 421); *Van Hook v. Burns*, 10 Wash. 22 (38 Pac. 763); *Cartin v. South Bound R. Co.* 43 S. C. 224 (20 S. E. 979); *Seymore v. Rice*, 94 Ga. 184 (21 S. E. 293); *Southworth v. Bennett*, 58 N. Y. 659; *Spalding v. Saltiel*, 18 Colo. 86 (31 Pac. 486); *Plummer v. Mold*, 22 Minn. 15.

2. It is in the discretion of the trial court whether or not an election shall be required: *Manders v. Craft*, 3 Colo. App. 236 (32 Pac. 836); *Einson v. N. R. Elec. Co.* 68 N. Y. Supp. 836 (34 Misc. 191); *Nadelman v. Pitchel*, 74 N. Y. Supp. 893 (36 Misc. 768); *Kerr v. Hays*, 35 N. Y. 336; *Southworth v. Bennett*, 58 N. Y. 659; *People v. Tweed*, 63 N. Y. 199; *Carlton v. Pierce*, 83 Mass. (1 Allen) 26; *Crafts v. Belden*, 99 Mass. 539; *Brady v. Ludlow*, 154 Mass. 468 (28 N. E. 901); *Burgett v. Allen*, 54 Ark. 560 (16 S. W. 573); *Hawley v. Wilkinson*, 18 Minn. 525 (Gil. 468); *Wagner v. Nagel*, 33 Minn. 348 (23 N. W. 308); *Rhodes v. Pray*, 36 Minn. 392 (32 N. W. 86).

3. The place of entry of plaintiff's cow upon defendant's right of way, and the point at which said cow was struck by defendant's train, were within a portion of the incorporated Town of Gold Hill laid out and platted in lots and blocks, and the defendant is not liable for a failure to fence, being under no statutory obligation to do so at such place: *B. & C. Comp.* § 5146; *Eaton v. McNeill*, 31 Or. 128 (8 Am. & Eng. R. R. Cas. N. S. 680, 49 Pac. 875); *Chicago, B. & Q. R. Co. v. Hogan*, 27 Neb. 801 (43 N. W. 1148); same case on another appeal, 30 Neb. 686 (46 N. W. 1015); *Chicago, B. & Q. R. Co. v. Hans*, 111 Ill. 117.

4. The question of the extent of the station grounds should be determined by the trial judge as a question of law: *Illinois Cent. R. Co. v. Whalen*, 42 Ill. 396; *McGrath v. Detroit, M. & M. R. Co.* 57 Mich. 555 (24 N. W. 854); *Rinear v. Grand Rapids & I. R. Co.* 70 Mich. 620 (38 N. W. 599); *Toledo Ry. Co. v. Cory*, 39 Ind. 222; *Evansville Ry. Co. v. Willis*, 93 Ind. 507; *Davis v. Burlington R. Co.* 26 Iowa, 550.

5. Railroad station grounds include the ground necessary or useful and used for the purposes of the freight and passenger business of the road, embracing all the business in which the public are interested. This includes the switching and making up of trains and the use of sidetracks for the storing of cars and the places where the public require open and free access to the road: *Moses v. Southern Pac. Co.* 18 Or. 385 (8 L. R. A. 135, 23 Pac. 498); *Plunkett v. Minnesota Ry. Co.* 79 Wis. 225 (48 N. W. 519); *Rinear v. Grand Rapids & I. R. Co.* 70 Mich. 620 (38 N. W. 599); *Grondin v. Duluth Ry. Co.* 100 Mich. 599 (59 N. W. 229); *Toledo Ry. Co. v. Spangler*, 71 Ill. 568; *Ohio Ry. Co. v. Roland*, 50 Ind. 349; *Cincinnati Ry. Co. v. Wood*, 82 Ind. 593; *Rabidon v. Chicago & W. M. Ry. Co.* 115 Mich. 390 (39 L. R. A. 405, 73 N. W. 386).

6. The place where the cow was killed was within the station grounds: *Toledo Ry. Co. v. Chapin*, 66 Ill. 504; *Peters v. Stewart*, 72 Wis. 133 (39 N. W. 380); *Mills & L. Lum. Co. v. Chicago Ry. Co.* 94 Wis. 338 (68 N. W. 996); *Rabidon v. Chicago & W. M. Ry. Co.* 115 Mich. 390 (39 L. R. A. 405, 73 N. W. 386).

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

1. The first question presented for our determination is one of practice, and arises upon the trial court's allowance of the motion requiring the plaintiff to elect as to which cause of action he would proceed upon at the trial. The complaint, we think, may appropriately be characterized as containing a duplicate statement of distinct grounds of recovery for the same right of action; the right arising from the single transaction in killing plaintiff's animal. The defendant is charged, however, with two culpatory acts in the invasion of plaintiff's right—one for a common-law negligence, and the other for failure to fence, a duty imposed upon it by statute—for either one of which plaintiff is accorded a right of action but the relief is different. Upon the ground first named, the measure of relief is the value of the animal lost, but upon the other it is the value of the animal, enhanced by reasonable attorney's fees for the prosecution of the action (Section 5146, B. & C. Comp.), so that there are

stated in the complaint two grounds of recovery for the same right; affording the plaintiff different reliefs, according to the cause maintained. He could not have two judgments, however, and a judgment in the one form would preclude a judgment in the other, as the law does not allow double damages for the invasion of the same right. For joining the two grounds or causes of action in the same count, the defendant had its motion before answer to strike out the complaint because they were not separately stated: B. & C. Comp. § 81. By pleading over the right to interpose such a motion was waived.

2. There is, however, another exigency to which this motion does not extend. If there be duplicate statements of the same cause of action, or statements of different grounds of recovery for the same right, the defendant is entitled, unless in exceptional cases, to have the plaintiff elect upon which ground or cause he will proceed to trial, and the motion directed to that purpose may be interposed at any time before the trial. Mr. Pomeroy states the rule as follows: "Since the reformed pleading requires the facts to be averred as they actually took place, it does not, in general, permit a single cause of action to be set forth in two or more different forms or counts, as was the familiar practice at the common law. The rule is undoubtedly settled that, under all ordinary circumstances, the plaintiff who has but one cause of action will not be suffered to spread it upon the record in differing shapes and modes, as though he possessed two or more distinct demands: and, when he does so without special and sufficient reason, he will be compelled, either by a motion before the trial, or by an application and direction at the trial, to select one of these counts, and to abandon the others": Pomeroy, Code Rem. (4 ed.), §§ 467, *576. Mr. Phillips says: "It may safely be said that the true rule, resting upon principle and supported by the weight of authority, now is that where a plaintiff has a single right of recovery that may rest upon one ground or upon another, according to the facts to be shown by the evidence, and he cannot safely foretell the precise nature and limits of the defendant's liability to be developed upon the trial, he may state his right of action variously, in separate causes of action. This privilege is an exception to the

general rule that each separate statement should set out a distinct and independent right of action, and, inasmuch as a plurality of statements multiplies the issues and tends to obscure the real claim which the defendant will have to meet it is to be indulged only where it is fairly necessary for the protection of the plaintiff, and where it will not mislead or embarrass the defendant in his defense": Phillips, Code Plead. § 207. See, also, *Spaulding v. Saltiel* 18 Colo. 86 (31 Pac. 486); *Cramer v. Oppenstein*, 16 Colo. 504 (27 Pac. 716); *Brown v. Kansas City, etc., Ry. Co.* 20 Mo. App. 429; *Otis v. Mechanics' Bank*, 35 Mo. 128; *Cartin v. South Bound R. Co.* 43 S. C. 221 (20 S. E. 979, 49 Am. St. Rep. 829).

The rule is well illustrated by a case from California. The complaint was filed, containing two counts—one for services performed on a promise to pay therefor a definite sum, and the other for the same services at their reasonable worth—and, upon a motion to require plaintiff to elect, the supreme court, sustaining the ruling of the trial court, said that the plaintiff may set out the facts "in two separate forms when there is a fair and reasonable doubt of his ability to safely plead them in one mode only": *Wilson v. Smith*, 61 Cal. 209, 210. So, in Wisconsin, *Whitney v. Chicago, etc. Ry. Co.* 27 Wis. 327, where the court for a like reason held it to be allowable for the plaintiff to charge the defendant on separate grounds in the capacity of a carrier and a warehouseman. So it was in *Bishop v. Chicago & N. W. R. Co.* 67 Wis. 610, 616 (31 N. W. 219), the court saying: "Since it is no longer necessary, in order to protect the rights of the plaintiff, that he should set forth in different counts the same cause of action—variances between the allegations and the proofs being disregarded unless they actually mislead the adverse party to his prejudice upon the merits—the practice of so doing is disapproved of, because it is not in harmony with the spirit of the Code.' An exception to this method of pleading is recognized by this court in a case when the plaintiff cannot know beforehand the precise nature and limits of the defendant's liability to him, and in such case it is permissible to allow the plaintiff to state his cause of action differently in different counts." Upon the other hand, an election was re-

quired in *Harris v. Wabash Ry. Co.* 51 Mo. App. 125, and *Matz v. Chicago & A. R. Co.* (C. C.) 88 Fed. 770—cases very similar to the one at bar. Three counts were contained in each complaint for the same demand or upon the same right of action. One was for a failure to fence as required by statute; another, for a failure to ring the bell and sound the whistle at a railroad crossing, also in violation of a statute; and the third, for common-law negligence. In the first case it is said: "The remedy afforded to the defendant in such a case of improper intermingling of causes of action which may be united in one petition, but must be separately stated, is by motion to elect, such as was adopted by this defendant." And in the other: "Such pleading makes a chance medley, instead of a plain and concise statement of the facts constituting the cause of action, as required by the Code."

3. The practice, however, of allowing or disallowing a motion of the kind, is a matter largely within the sound discretion of the trial court: *Manders v. Craft*, 3 Colo. App. 236; *Carlton v. Pierce*, 1 Allen, 26; *Hawley v. Wilkinson*, 18 Minn. 525 (Gil. 468); *Plummer v. Mold*, 22 Minn. 15; *Wagner v. Nagel*, 33 Minn. 348 (23 N. W. 308); *Kerr v. Hays*, 35 N. Y. 331.

4. There should not be a confusion of the right of action with the cause of action. Different rights of action should always be separately stated when they can be united in the same complaint. Different grounds of action for the same right give rise to different causes, which may or may not be united, according to the rule denoted by the above authorities. In the present case, as we have seen, different grounds are assigned in the same count. The right of action is essentially the same, but the relief is different. For this latter reason the trial and the adjustment of a verdict would be attended with more or less confusion, and, the grounds being such in either alternative that the plaintiff must have known the precise nature and limits of the defendant's liability, we are of the opinion that the trial court's discretion in the premises was legally and properly exercised.

5. It is not an objection that the motion to elect was not made in the justice's court. It in no way changes the issue,

and might be made in the circuit court at any time before trial: *Wirth v. Bartell*, 84 Wis. 209 (54 N. W. 399).

6. The only other question presented relates to the court's direction to the jury to find a verdict for the defendant, and this may be resolved by a determination as to whether, as a matter of law, the animal was killed within the limits of the defendant's station grounds. The defendant's railroad extends through the platted portion of the Town of Gold Hill, the right of way occupying a strip 350 feet in width; and the station grounds, whatever may be their true limits, are entirely within such platted exterior. The animal was killed at the water tank, situated 520 or 530 feet easterly from the passenger depot, and used also as a general freight depot. A few feet east of the water tank is a switch for a side track, which runs parallel with and near the main line; passing in front of the passenger depot, between it and the main line, and connecting with the latter again some distance west. Three hundred and sixty feet east of the tank is another switch, giving passage upon a side track on the south. This latter diverges from the main line 50 or 60 feet at its widest limit, passes the depot building, and again connects with the main line 600 or 700 feet to the west. Upon this latter side track are situated three warehouses, used for storage and shipping purposes, one of which being located very near the water tank. A principal street of the Town of Gold Hill (Fourth Street) crosses the tracks of the company immediately east of the depot building. As to these facts there is or can be no controversy. The company claims that the yard limits extend beyond the switch intersections. The place of entry of the animal upon the defendant's tracks is not made a point for consideration in the case, nor is it material. By the statute, station grounds are not required to be fenced: B. & C. Comp. § 5146. The water tank was inside the switches used at the station for transferring to the side tracks, one of which tracks, as we have seen, together with the main line, was used in connection with the general depot for the receipt and discharge of passengers and freight, and the other in connection with the warehouse, where it was necessary that the public should have access for the convenient

transaction of business with the company. This establishes the locus in quo within the most restricted limits of station or depot grounds as defined by the authorities, more especially as it lies within the inner switch connection: 9 Am. & Eng. Enc. Law (2 ed.), 367; *Peyton v. Chicago, R. I. & P. Ry. Co.* 70 Iowa, 522 (30 N. W. 877); *Grosse v. Chicago & N. W. R. Co.* 91 Wis. 482 (65 N. W. 185); *Mills & L. Lum. Co. v. Chicago & St. Paul R. Co.* 94 Wis. 336 (68 N. W. 996). The length of the ordinary overland passenger trains will reach more than the distance from the water tank to the passenger depot, so that a train going east, with the engine taking water at the tank, would leave the hindmost coach resting back past the passenger depot, and at the same time would stand across a public street of the town. Such a demonstration leaves no rational ground upon which to predicate a question of fact for the jury. There can be but one inference in the premises, which is that the entire space, at the very least, from the tank or first switch to the passenger depot, was within the proper limits of the defendant's station grounds at that point. The motion for a directed verdict was therefore properly allowed: *McGrath v. Detroit, M. & M. R. Co.* 57 Mich. 555 (24 N. W. 854); *Rinear v. Grand Rapids & I. R. Co.* 70 Mich. 620 (38 N. W. 599); *Rabidon v. Chicago & W. M. R. Co.* 115 Mich. 390 (73 N. W. 386, 39 L. R. A. 405); *Illinois Central v. Whalen*, 42 Ill. 396.

These considerations affirm the judgment of the trial court, and it is so ordered.

AFFIRMED.

Decided 12 June, 1905.

WOODS v. OREGON SHORT LINE R. CO.

81 Pac. 235.

APPEAL FROM JUSTICE'S COURT—EFFECT OF DEFECTIVE TRANSCRIPT ON JURISDICTION OF JUSTICE'S COURT.

1. On appeal from a justice's court, the filing of a transcript, though imperfect, with the clerk of the circuit court within the time allowed by law, gives the circuit court jurisdiction.

DEFECTIVE TRANSCRIPT FROM JUSTICE'S COURT—RIGHT TO RULE TO SUPPLY DIMINISHED RECORD.

2. Where an appeal from a justice's court is taken in good faith, and the necessary undertaking given and the transcript filed with the clerk of the circuit court within the time allowed by law, appellant is entitled to a rule to compel the justice to amend and correct his certificate so as to show the facts.

From Baker: ROBERT EAKIN, Judge.

Action by ~~W. I.~~ Woods against the Oregon Short Line Railroad Co. From a judgment for ~~plaintiff~~ defendant appeals.

~~REVERSED.~~

For appellant there was a brief over the names of *Parley Lycurgus Williams, Frank Sigel Deitrich* and *Albert Newman Soliss*, with an oral argument by *Mr. Soliss*.

For respondent there was a brief over the names of *Charles Elmer Norton* and *Hart & Smith*, with an oral argument by *Mr. William Smith*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an action to recover damages for the killing of an animal belonging to the plaintiff, and originated in a justice's court. On October 15, 1904, a judgment was recovered by the plaintiff against the defendant in such action for \$249.50, from which defendant regularly appealed to the circuit court by giving notice and filing an undertaking as required by law. This appeal was duly allowed by the justice. A copy of what purported to be the entries in the justice's docket relating to the case and the appeal, together with the original complaint, summons, answer, notice to the defendant to produce certain evidence, motion for nonsuit, undertaking on appeal, and cost bill, were filed as one document with the clerk of the circuit court. The copy of the entries in the justice's docket were certified to by him to be "a correct copy of said judgment, and of the whole thereof, as it appears of record in my office and custody," but there was no certificate that it was a copy of all the material entries in the docket relating to the cause or the appeal, or that all or any part of the original papers were attached thereto. Some time after the first day of the next term of the circuit court the plaintiff moved to dismiss the appeal on the ground that it did not appear that the transcript as filed contained all the material entries in the justice's docket, nor that all the original papers relating to the case or the appeal, and filed with the justice, were attached to the transcript, and, generally, that the transcript was insuf-

ficient to confer jurisdiction on the court to hear and try the cause. Before this motion was disposed of, the defendant asked for a rule on the justice requiring him to amend and correct his certificate by stating whether the transcript contained all the material entries in his docket, and whether all the original papers were attached thereto. The motion for a rule on the justice was overruled, and the appeal dismissed, because a transcript, as provided by Section 2246, B. & C. Comp., was not filed within the time allowed by law, and therefore the court was without jurisdiction other than to dismiss the appeal.

1. Prior to the recent decision of *Hager v. Knapp*, 45 Or. 512 (78 Pac. 671), there was some question in the courts and at the bar as to whether the circuit court acquired jurisdiction on an appeal from a justice's court unless a perfect transcript was filed with the clerk of the circuit court on or before the first day of the term next following the allowance of the appeal, but that decision settled the law to the effect that the filing of an imperfect transcript with the clerk of the circuit court within the time allowed by law gave such court jurisdiction, and the right thereafter to permit an omission or defect in the transcript to be corrected, but that its refusal to do so cannot be reviewed on appeal, except for an abuse of discretion. Under this decision the court below was in error in holding that it was without jurisdiction, and in dismissing the appeal for that reason, and, since it did not exercise any discretion in the matter of sustaining or overruling the motion to correct the transcript, the question of an abuse of discretion is not in the case.

2. It appears from the record that the appeal was apparently taken in good faith, the necessary undertaking given, and the transcript filed with the clerk of the circuit court within the time allowed by law. The only defect is that the certificate of the justice was imperfect. This is merely technical, and did not affect the merits of the case, and we think the appellant should have been permitted to have the certificate amended so as to speak the truth and show the actual facts: *Coates v. Bryan* (Tex. Civ. App.), 40 S. W. 748.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion. **REVERSED.**

Argued 13 April, decided 12 June, 1905.

BROWN v. KEMP.

81 Pac. 236.

EASEMENTS—WAY OF NECESSITY.

1. Where a parcel of land sold out of a larger tract is not accessible from any public highway, being surrounded by land of other owners except where touched by the remaining property of the grantor, the deed impliedly conveys also a right of way over the latter tract to a highway.

USE AS NOTICE OF EXISTENCE OF AN EASEMENT.

2. The open and visible use of an easement—as, a road—is notice to a purchaser of the servient estate of the existence and extent of the right.

From Polk: REUBEN P. BOISE, Judge.

Suit by Joseph W. Brown against Mary Kemp and others, resulting in a decree for defendants. AFFIRMED.

For appellant there was a brief over the names of *W. H. and Webster Holmes*, with an oral argument by *Mr. William Henry Holmes*.

For respondents there was a brief over the names of *Oscar Hayter* and *Earl C. Bronaugh*, with an oral argument by *Mr. Hayter*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is a suit to quiet title to real property. The facts are that in May, 1899, the Dundee Mortgage & Trust Investment Co. was and for many years had been the owner of the Hooker donation land claim, in Polk County, consisting of 620 acres. This claim was about two miles long east and west, and about half a mile wide north and south. On the day named it sold 160 acres from the west end of the claim to the defendant Williams, and on November 19, 1900, sold to the defendant Kemp 140 acres adjoining that previously sold to Williams on the east. At the time of these sales there was, and ever since has been, but one public highway touching the land, and it ran from the southeast corner along the boundary on the east for about half way across the claim, and then turned due east. At the turn of the road is located a gate and only outlet from the claim to the public highway. At the time of the sales to Williams and Kemp there was a well-defined driveway from this gate, running in a westerly direction across that part of the Hooker land claim retained by the mortgage company to the land sold by it

to them, and which furnished them the only access to a public highway. There was no express grant of a right of way to Williams through the remaining land of the mortgage company, but in the contract for the sale between it and Kemp there was a reservation in favor of Williams of a right of way for him over the land sold to Kemp, and a stipulation that in all future sales by the company a right of way would be reserved over the land then owned by it for the use of the owners of the tracts previously sold. This contract was not recorded, however, and on October 21, 1901, the mortgage company sold the remainder of the claim to the plaintiff, and conveyed it to him by warranty deed, without reserving such right of way. Williams and Kemp continued to use the way over and across the land sold by the mortgage company to the plaintiff for some time after his purchase, when some controversy or dispute arose as to their right to do so, which resulted in this suit.

1. The sales by the mortgage company to Williams and Kemp of tracts of land in the west end of the Hooker donation land claim carried with them, by presumption of law, to the grantees a right of way over the unsold portion of the claim retained by the company, for without such a way the land sold would be practically useless to the grantees. It was surrounded by that of private individuals, and there was no means of reaching a public highway, except over the land of the mortgage company or by trespassing on that of a stranger; and the rule of law is that "if one conveys to another, out of a parcel of land, a part lying neither on the highway nor on the grantee's other land, it will be useless to the new owner, unless he can have access to it; hence, by presumption of law, the deed carries with it to the grantee a right of way over the unconveyed part. And this rule applies as well to an equitable as to a legal conveyance": Bishop, *Noncontract Law*, § 872; Goddard, *Easements* (Bennett's Ed.), p. 266; Washburn, *Easements* (2 ed.), p. 39; *Whitehouse v. Cummings*, 83 Me. 91 (21 Atl. 743, 23 Am. St. Rep. 756); *Collins v. Prentice*, 15 Conn. 39 (38 Am. Dec. 61).

2. The way from the land sold to the defendants Williams and Kemp to the public highway over and across the land subsequently sold by the mortgage company to the plaintiff was

open and visible and in use at the time of plaintiff's purchase, and this fact constituted sufficient notice to him of the existence of the easement in favor of defendants: *Robinson v. Thrailkill*, 110 Ind. 117 (10 N. E. 647); *Ellis v. Bassett*, 128 Ind. 118 (27 N. E. 344, 25 Am. St. Rep. 421).

The decree of the court below is therefore affirmed.

AFFIRMED.

Decided 3 July, 1905.

STATE ex rel. v. MALHEUR COUNTY COURT.

81 Pac. 368.

46	519
48	309
48	318

CONSIDERATION OF CONSTITUTIONAL QUESTIONS.

1. Courts should not pass upon constitutional questions when the case at bar can logically be disposed of on other grounds.

MANDAMUS—PRECEDENT CONDITIONS.

2. To authorize the issuance of a writ of mandamus, the petitioner must show first, a legal right in himself to have the act done which is sought by the writ; and, second, that it is the plain legal duty of defendant to perform the act, without discretion to do or refuse it.

COUNTY COURT—DECLARING RESULT OF LOCAL OPTION ELECTION.

3. Under the Local Option Act of 1904 (Laws 1905, pp. 41, 47, c. 2, § 10), after the returns of an election on the question of prohibiting the sale of liquors have been abstracted, and a majority of the votes appear for prohibition, it is the imperative duty of the county court, sitting specially under the provisions of this act, to at once make an order declaring the result and forbidding the sale of intoxicating liquors within the prescribed limits.

MANDAMUS TO COUNTY COURT TO PROHIBIT SALE OF LIQUORS UNDER LOCAL OPTION LAW—PLEADING.

4. A writ of mandamus directing a county court to make an order declaring the result of an election and prohibiting the sale of intoxicating liquors in a certain district, should show specifically that all the conditions legally required for such an order have been fulfilled, as, for instance, that a petition of the required per cent of qualified voters was properly filed, and that the election was ordered and was held in pursuance of such order.

MANDAMUS—PLEADING CONCLUSIONS.

5. Where a matter is collateral to the essential act involved, it is usually sufficient to allege it generally, as, that a certain election was duly held, or that one purporting to be a public officer was duly elected, but that will not do when the existence of the ultimate fact is the very question in dispute, then the basic facts must be set forth in detail.

CONSTRUCTION OF WRIT ON DEMURRER.

6. A demurrer to an alternative writ of mandamus is a convenient means of testing its sufficiency, and the writ will be construed against the pleader when so tested.

From Malheur: GEORGE E. DAVIS, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is a proceeding by mandamus by the State on the relation of W. L. Gibson and others to compel the county court (consisting of the county judge and two commissioners) of Mal-

heur County to declare the result of an election alleged to have been held under what is known as the "Local Option Act" (Laws 1905, p. 41, c. 2,) adopted by the people at the June election of 1904, and by appropriate order prohibit the sale of intoxicating liquors in Nyssa Precinct, in said county. The alternative writ, after stating that the relators are inhabitants, taxpayers and voters of the precinct, and that the defendants are the duly elected judge and commissioners of Malheur County, and constitute the county court in and for said county, and setting out the provisions of section 10 (page 47) of the act as it relates to the opening and abstracting of the election returns by the county clerk and two justices of the peace, and the making of an order by the court declaring the result of the vote, and prohibiting the sale of intoxicants, alleges "that, as provided by said local option liquor law, an election was duly held on the first Tuesday after the first Monday of November, 1904, in the County of Malheur, State of Oregon, to determine whether intoxicating liquors should be prohibited in said county as a whole," and further, in effect, that within 10 days after said election the county clerk, taking to his assistance two justices of the peace of the county, opened the votes and made an abstract thereof for the information of the county court; that said canvass and abstract showed that in the precinct of Nyssa there were 68 votes cast for prohibition, and 22 against, and that a majority were for prohibition; that it thereupon became the duty of the county court to declare the result of such vote, and to make and enter an order absolutely prohibiting the sale of intoxicating liquors in said precinct until such time as the qualified voters of such district should by a majority vote declare otherwise; that said county court in due time held a special session, but refused to make any order declaring the result of such vote, or prohibiting the sale of intoxicants in such precinct, contrary to the provision of said local option law; and that the relators have no plain, speedy and adequate remedy at law. The defendants demurred to the writ on the grounds that the court was without jurisdiction, and the same did not state facts sufficient to constitute a cause for the relief demanded. The demurrer being sustained,

and the plaintiffs refusing to plead further, the writ was dismissed, and plaintiffs appeal. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. George Frederick Martin*.

For respondent there was a brief and an oral argument by *Mr. George Wesley Hayes*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

But one question is involved herein at this time, and that is whether the writ states facts sufficient to constitute a cause for relief. We have concluded that, as tested by a demurrer, it does not, because it does not show that a petition of 10 per cent of the registered voters of the county was filed with the county clerk in the manner prescribed by the act, that the county court ordered an election to be held, and that one was held in pursuance of such petition and order. Such conclusion disposes of the case, and renders it unnecessary that we look into other questions presented, touching the constitutionality of the act.

1. It is a rule of law, the observation of which is incumbent upon the courts, not to consider a constitutional question when the case can readily and logically be disposed of upon other grounds. If our decision were otherwise upon the demurrer, so that the sufficiency of the writ would have depended upon the constitutionality of the act, then these questions would have been of the very essence of the controversy, and it would have been proper for us to have considered and disposed of them.

2. Our reasons for the conclusion reached are elementary. To authorize an issuance of a writ of mandamus, it is necessary that the petitioner first show a legal right in himself to have the act done which is sought by the writ; and, second, that it is the plain legal duty of the defendant to perform the act, without discretion to do or refuse it: *Spelling, Extra. Rem. § 1369; 19 Am. & Eng. Enc. Law (2 ed.), 725 et seq.*

3. As we view the local option act, the county court is vested with no discretion in the premises. When the returns are opened and the abstract has been made by the clerk and justices, and it is shown that the majority of the votes is for prohibition,

the county court has but one duty to perform, and that is to make the order prohibiting the sale of intoxicating liquors within the district involved. The court does not sit in its ordinary or regular capacity under the constitution and statutes, for hearing causes or transacting county business, but in a special capacity under the act. These special duties are plainly prescribed, which are to be performed not upon any discretion vested in the court, but upon the exigency of certain conditions that are left to the electors of the district involved to bring about. When the conditions exist, the duties follow without more, and are to be discharged in a purely ministerial capacity, to carry out the purposes of the act.

4. But, to put these officers in the wrong it is essential to show by apt allegations that it has become their duty to act under the law, and for that purpose it was insufficient to allege merely that an election was duly held. This allegation, under the conditions here present, is a mere conclusion of law, and, in order to show that an election was duly held, it was essential to show that the successive prescribed steps which lead up to it were taken; that is, that there was the proper petition filed with the county clerk, and that upon that petition an election was ordered to be held, and that in pursuance of such order the election was held. Without these there could have been no election "duly held." These acts are made by the law the essentials to an election, and, in order to charge the county court with the dereliction of its ministerial duty to order prohibition, they must be shown to have been observed.

5. Where the matter is collateral to the essential fact, it is sufficient to allege generally that an election was duly held, or that an officer was duly elected and qualified, assuming to act in the particular capacity involved, as it has been alleged herein that the defendants are the duly elected judge and commissioners; but, where the fact itself must appear, it is not sufficient to say that it had been duly performed, without stating how.

6. It must be considered that the demurrer is the test here, and the writ is to be construed most strictly against the pleader; and, thus construed, the essential acts must appear to have been performed or observed, as prescribed by the act, which precede

the duty required of the county court, or else it cannot be required to act, and such is not the case here, except by legal conclusion.

The judgment of the circuit court will be affirmed, and it is so ordered. **AFFIRMED.**

Argued 9 February, decided 10 April, 1905.

MULTNOMAH COUNTY v. TITLE GUARANTEE CO.

80 Pac. 409.

CONSIDERATION FOR COMPROMISE AGREEMENT—COUNTIES.

1. Where a genuine dispute exists between parties claiming conflicting rights, as, for instance, between a county and a property owner as to the validity of certain tax claims and tax sale certificates, a compromise and settlement of their respective claims is upon a sufficient consideration.

RESCISSION OF EXECUTED CONTRACT—RETURNING CONSIDERATION.

2. An executed or partly executed contract cannot be rescinded by one of the parties, in the absence of fraud, without returning the consideration, or restoring the other party to his former position. This case illustrates: A property owner having compromised sundry tax disputes with a county by paying a sum of money and dismissing certain suits and appeals, the county cannot rescind the settlement while retaining the money and the advantage of the dismissals.

COUNTIES—VALIDITY OF TAX SETTLEMENTS NOT FRAUDULENT.

3. Where a compromise settlement with a board of county commissioners of sundry taxes and tax certificates in litigation was not fraudulent, the board, if it had the power to make the settlement, cannot rescind it and retain the proceeds after the decree adjudging the certificates valid has become final, though the agreement of compromise included taxes not referred to in the offer to compromise, and the statement as to the amount of the taxes was incorrect. The commissioners act in such cases as fiscal agents of the county, and they and the county are subject to the rules ordinarily applicable between principal and agent.

POWER OF COUNTY COMMISSIONERS TO SETTLE LITIGATION.

4. Under B. & C. Comp. §§ 912, 913, 2518, authorizing suits against a county, conferring power on the county commissioners in relation thereto, and permitting them to release any debt or damages arising out of contracts due the county, on such terms as may be just, the county commissioners can settle pending controversies as to the validity of tax certificates held by the county, and the rights of the respective parties thereunder.

SETTLEMENTS BY COUNTY COMMISSIONERS—STATUTORY CONSTRUCTION.

5. Section 912 of B. & C. Comp., subd. 10, authorizing the county court to release any debt or damages arising out of a contract due the county, does not preclude the county court from the settlement of controversies arising in other ways, under the rule that expression of one power excludes all others, since other sections of the statutes make it evident that no such intention existed.

POWER OF COUNTY OVER LAND BOUGHT FOR DELINQUENT TAXES.

6. Under Laws 1893, p. 28, authorizing the county judge to purchase property at delinquent tax sales, and declaring that it shall become the property of the county, subject to redemption, such property, after purchase, is entirely under the control of the county commissioners, and the interests of other municipalities therein are subject to its disposal.

IDEM.

7. The clause in Laws 1893, p. 28, providing that land purchased by a county for unpaid taxes shall become the property of such county,

subject to redemption, is intended to preserve to the owner the right to redeem, and not to prevent the county from otherwise disposing of it. The county may dispose of it as may be deemed advisable, as, by compromising its title and giving up its claim entirely.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. JUSTICE BEAN.

This is a suit by Multnomah County against the Title Guarantee & Trust Co. and others to set aside and cancel a compromise agreement or settlement of a controversy between the plaintiff and the defendants concerning the validity of certain tax certificates held by the plaintiff against block 178 in the City of Portland, and 80 acres of land in the Quinn donation land claim, in or near that city. The property was assessed to P. A. Marquam for the year 1894, and to his successor in interest, the defendant trust company, for the years 1895 to 1897, inclusive. The taxes for these years—amounting in all, including penalties and costs, to about \$25,000—were not paid, and the land was sold to the plaintiff in 1899, under a warrant for the collection thereof. The defendant trust company thereafter commenced suit to quiet its title to the premises. The county answered, setting up the tax proceedings and the purchase of the land by it, and obtained a decree in its favor. From this decree the trust company appealed. Pending the appeal, and on December 12, 1900, the defendant Ross, trustee, who had in the mean time succeeded to the title to the property, made to the board of county commissioners of the plaintiff a written proposition to compromise the pending litigation concerning the plaintiff's title and rights under the tax certificates, and also a dispute or controversy between him and the plaintiff as to the validity of the taxes levied against the property for the years 1898 and 1899, which in the mean time had become delinquent, and the land had been sold and purchased by the county. The board of county commissioners, after consideration of the matter, deeming the proposition of Ross to be for the best interests of the county, accepted it, and caused to be entered in their journal an order that, upon the payment by Ross of \$15,774.52 and the costs of the pending litigation, "all the taxes, tax sales or tax liens, due or held by the county for each and every year prior to 1900 be, and the same are hereby, satisfied and canceled, and that each

and every one of the tax certificates held by the county against said property for each and every year prior to 1900 be canceled and surrendered up; it being understood that this compromise and settlement includes, satisfies and discharges all claims of the county for taxes of whatsoever nature prior to the year 1900." Relying upon this settlement or compromise, and assuming that it was valid, Ross paid to the county the amount of money agreed upon, and caused the appeal in the suit brought by the trust company against the county to quiet its title to be dismissed, and the several tax certificates or liens were by the county canceled of record.

Two and one-half years or more thereafter the board of county commissioners of the plaintiff made an order attempting to rescind the compromise and settlement on the ground that it was made "without jurisdiction and was illegal and void." This suit was afterwards brought to cancel and annul such settlement, without returning or offering to return to the defendants the amount of money paid by them in reliance thereon, and without restoring or attempting to restore them to the position they occupied prior to such settlement. The complaint sets out in detail the proceedings before referred to, and avers that many of the statements contained in the proposition of Ross, upon which the settlement was based, were and are untrue, and that the order of the board of county commissioners includes and attempts to cancel a large amount of taxes and tax certificates not mentioned in the proposition of Ross, nor involved in the pending litigation between the county and the defendants, and were neither irregular nor invalid. The prayer is for a decree against defendants for taxes, costs, and penalties against the property, less the amount paid on the compromise agreement, canceling all the entries in the records of the county showing satisfaction of such taxes and tax certificates, and enjoining and restraining the defendants from claiming or asserting the illegality or invalidity of the right or title of the county in the land acquired under the tax proceedings. A demurrer to the complaint was overruled, and, the defendants declining further to plead, a decree was entered in favor of plaintiff as prayed for, except that the court

declined to require the defendants to pay and satisfy the taxes against the property. From this decree the defendants appeal.

REVERSED.

For appellants there was an oral argument by *Mr. William Ambrose Munly*, with a brief over the name of *J. Thorburn Ross, W. A. Munly and John K. Kollock*, to this effect.

I. The board of county commissioners in transacting the business of the county in the care and management of county property, funds and business, under B. & C. Comp. § 912, and subd. 9, acts as the fiscal agent of the county and precisely as would the agent of a private corporation in the management of its affairs: *Crossen v. Wasco County*, 10 Or. 111; *Frankl v. Bailey*, 31 Or. 285, 288 (50 Pac. 186); *Stout v. Yamhill County*, 31 Or. 314, 319 (51 Pac. 442).

Acting as such fiscal agent it has the power to settle and compromise claims for or against the corporation: *Frankl v. Bailey*, 31 Or. 285, 288 (50 Pac. 186); *Clark & M. Corp.*, p. 2101.

The board of county commissioners, acting as the fiscal agent of the county, is empowered to make contracts and compromises of claims for or against the county, and to settle suits or actions for or against the county, by B. & C. Comp. §§ 912, subd. 9, 913 and 2518.

II. See constructions of statutes similar to ours in various states holding that boards of county commissioners have full authority to compromise disputed claims, and to surrender county property in such compromises: *Allen v. Cerro Gordo County*, 34 Iowa, 52; *Grimes v. Hamilton County*, 37 Iowa, 379; *Mills County v. Burlington & M. Ry. Co.* 47 Iowa, 66; affirmed on appeal, 106 U. S. 557; *Collins v. Welch*, 58 Iowa, 72 (43 Am. Rep. 111, 12 N. W. 121); *Board of Supervisors v. Van Stralen*, 45 Wis. 676; *Hall v. Baker*, 74 Wis. 124 (42 N. W. 104); *Washburn County v. Thompson* 99 Wis. 585 (75 N. W. 309); *Board v. Birdsall*, 4 Wend. 453; *Buffalo v. Bettinger*, 76 N. Y. 393; *Woods v. Supervisors*, 136 N. Y. 403 (32 N. E. 1011); *State v. Davis*, 11 S. D. 111 (74

Am. St. Rep. 780, 75 N. W. 897); *Brown County v. Jenkins*, 11 S. D. 330 (77 N. W. 579); *Petersburg v. Mappin*, 14 Ill. 193 (56 Am. Dec. 501); *Shawneetown v. Baker*, 85 Ill. 563; *Fitzgerald v. Harms*, 92 Ill. 372; *Agnew v. Brall*, 124 Ill. 312 (16 N. E. 230); *St. Louis, I. M. & S. Ry. Co. v. Anthony*, 73 Mo. 431. *State ex rel. v. Martin*, 27 Neb. 441 (43 N. W. 244); *Prout v. Pittsfield Fire Dist.* 154 Mass. 450 (28 N. E. 679); *Board v. Saunders*, 17 Ind. 437; *Logansport v. Dykeman*, 116 Ind. 15 (17 N. E. 587); *San Antonio v. Street Ry Co.* 22 Tex. Civ. App. 148 (54 S. W. 281); *Smith v. Wilkinsburg Borough*, 172 Pa. 121 (33 Atl. 371).

III. If it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to a former statute, such meaning will amount to a legislative declaration of the meaning of the prior statute, and will govern its construction: Endlich, Interpret. Stat. §§ 43, 44, 47, 366; 26 Am. & Eng. Enc. Law (2 ed.), 624; *Alexander v. Mayor*, 9 U. S. (5 Cranch) 7; *United States v. Freeman*, 44 U. S. (3 How.) 564; *United States v. Alexander*, 79 U. S. (12 Wall.) 180; *Cope v. Cope*, 137 U. S. 688 (11 Sup. Ct. 222); *Superior v. Norton*, 63 Fed. 357; *United States v. Morton*, 65 Fed. 209; *Hunt v. Hunt*, 37 Me. 348; *Cannon's Admr. v. Vaughn*, 12 Tex. 399; *Lawrence v. People ex rel.* 188 Ill. 413 (58 N. E. 991); *Georgia Penitentiary v. Nelms*, 65 Ga. 67; *Northern Pac. R. Co. v. Barnes*, 2 N. D. 260 (51 N. W. 401); *Philadelphia R. Co. v. Catawissa R. Co.* 53 Pa. 61; *Cochen v. Methodist Church*, 32 N. Y. App. Div. 239; *Smith v. People*, 47 N. Y. 330; *In re Livingston*, 121 N. Y. 104 (24 N. E. 290); *Hart v. Reynolds*, 48 Tenn. (1 Heisk.) 217; *Commonwealth v. Sylverster* (13 Allen), 95 Mass. 247; *State v. Ohio S. & S. Orphans' Home*, 37 Ohio St. 275; *Supervisors v. Ehlers*, 45 Wis. 295.

IV. A compromise made by a trustee, if for good cause and in good faith, will be sustained: *Blue v. Marshall*, 3 P. Wms. 381; *Forshaw v. Higginson*, 3 De. G. M. & G. 827; *Ratcliffe v. Winch*, 17 Beav. 217; *Mayer v. Foulkrod*, 4 Wash. C. C. 349 (Fed. Cas. 9342); *Jeffries v. Mutual Life Ins. Co.* 110 U. S. 305 (4 Sup. Ct. 8); *Moulton v. Holmes*, 57 Cal. 337; *Mulville v. Pacific Mut. Life Ins. Co.* 19 Mont. 101 (47 Pac. 650); *Brun-*

er's Appeal, 57 Pa. 52; *Wyman's Appeal*, 13 N. H. 18; *Broxton v. Harrison*, 11 Gratt. 54; *Boyd v. Oglesby*, 23 Gratt. 684; *Davenport v. First Cong. Soc.* 33 Wis. 390; *Wamsley v. Wamsley*, 26 W. Va. 47; *Gomez v. Gomez*, 54 N. Y. Sup. 237; *Choteau v. Suydam*, 21 N. Y. 179; *Chase v. Bradley*, 26 Me. 531; *Pool v. Dial*, 10 S. C. 440; *Clarke v. Cordis*, 86 Mass. (4 Allen), 466; *Perry, Trusts*, § 482; *Ames, Trusts*, § 494, note.

V. A contract must be rescinded, if at all, as a whole; it cannot be regarded as valid in part and bad in some particulars: *Crossen v. Murphy*, 31 Or. 114, 118 (49 Pac. 858); *Bohall v. Diller*, 41 Cal. 532; *Kelley v. Owens*, 120 Cal. 502 (47 Pac. 369, 52 Pac. 143); *Neal v. Reynolds*, 38 Kan. 432 (10 Pac. 785); *Perley v. Balch*, 40 Mass. (23 Pick.) 283 (34 Am. Dec. 56); *Hyslip v. French*, 52 Wis. 513 (9 N. W. 605); *Hoffman v. King*, 70 Wis. 372 (36 N. W. 25).

VI. It is necessary for the county, before it can obtain the relief of the rescission of this contract or compromise, to make a tender of the consideration paid by the defendants, to restore them all their rights and property and place them in statu quo: *Knott v. Stephens*, 5 Or. 235; *Frink v. Thomas*, 20 Or. 265 (25 Pac. 717, 12 L. R. A. 239); *Clarno v. Grayson*, 30 Or. 111 (46 Pac. 426); *Crossen v. Murphy*, 31 Or. 114, 118 (49 Pac. 858); *Scott v. Walton*, 32 Or. 460 (52 Pac. 180); *Vaughn v. Smith*, 34 Or. 54, 55 (55 Pac. 99).

For respondent there was an oral argument by *Mr. Charles Henry Carey*, with a brief over the names of *John Manning*, District Attorney, and *Carey & Mays*, to this effect.

1. It being claimed by the respondent that the county court had power to make the order in question, because it had power to compromise claims against the county, and especially pending litigation against the county, and that the order of the county court was therefore valid, we affirm that this point does not arise in the case, for the reason that if the court has such power the allegations of the complaint nevertheless show that the order is void because it not only settles the taxes and cancels the tax titles involved in the pending suit, but attempts to cancel a large amount of taxes that were neither irregular nor

invalid, nor in controversy in the suit, nor included in the petition upon which the order is based.

In any event the power of the county court to compromise a pending suit such as is mentioned in the complaint is doubtful: B. & C. Comp. §§ 912, 913, 2518.

2. The county became a trustee for the City of Portland, the Port of Portland, and the school district in which the real property was situated, when it purchased the property at tax sale, to the extent of the amount of the taxes due to these public corporations, and had no power to compromise the taxes due these corporations without express statutory authority.

As to the Port of Portland, see Laws 1891, p. 793, §§ 5, 8; Laws 1899, p. 149, § 5; Laws 1901, pp. 426, 428, §§ 16, 17; B. & C. Comp. §§ 4650, 4651.

As to the school district, see Laws 1892, p. 118, §§ 3, 4, 6, 7, 11; B. & C. Comp. §§ 3097, 3098, 3100, 3101, 3104, 3374.

3. The order surrendering these properties is absolutely void. An order made by the county commissioners in excess of their powers has no binding force. Thus, it has been held that where the county court has allowed a claim against the county which is not legally allowable, the county may, notwithstanding the order, sue and recover the money: *Grant County v. Sells*, 5 Or. 243; *Union County v. Hyde*, 26 Or. 24 (37 Pac. 76); *Board of Comrs. v. Heaston*, 144 Ind. 583 (55 Am. St. Rep. 192, 41 N. E. 457, 43 N. E. 651); *Board of Comrs. v. Patrick*, 12 Kan. 605; *State v. Washoe County*, 14 Nev. 66; *Board of Comrs. v. Van Clief*, 1 Hun, 454; *Board of Superrisors v. Ellis*, 59 N. Y. 620.

4. When county officers undertake to exercise powers, the mode or manner of their procedure must be as prescribed by law. If they attempt to exercise any power otherwise than as prescribed by law, their action is absolutely void: *Lyon County v. Ross*, 24 Nev. 102 (50 Pac. 1); *Douglass v. Lowell*, 60 Kan. 239; *People ex rel. v. Roberts*, 8 App. Div. 219 (151 N. Y. 540, 45 N. E. 941).

5. A sale of lands for taxes, whether the purchaser be the State or county, after the period of redemption expires, gives the purchaser an absolute title in fee simple: *Lyon County v. Ross*, 24 Nev. 102 (50 Pac. 1); *Connecticut Mut. L. Ins. Co. v.*

Wood, 115 Mich. 444 (74 N. W. 656); *Muskegon Lum. Co. v. Brown*, 66 Ark. 539 (51 S. W. 1056).

6. It is not only competent but the duty of county commissioners to rescind an order improvidently granted to release one from the assessment of a legal tax upon property: *Lemly v. Forsyth County Comrs.* 85 N. C. 379.

MR. JUSTICE BEAN delivered the opinion of the court.

The ground upon which the plaintiff bases its right to repudiate and rescind the compromise or settlement between its board of county commissioners and the defendants are mainly as follows: First, the board had no authority to make the agreement or settlement, because (a) no such power is conferred upon it by law; (b) other public corporations besides the county, such as the Port of Portland, the City of Portland, and the school district, had interests in the tax certificates, which the county could not surrender or dispose of; and (c) the act authorizing the county to purchase property at a delinquent sale provides that it shall hold the title subject to redemption, thus impliedly prohibiting the taxpayer from relieving himself from the effect of the sale in any other manner; second, the compromise included taxes and tax certificates not involved in the suit then pending between the plaintiff and the defendants, and which were not mentioned or referred to in the proposition of Ross for settlement; and, third, the offer or proposition of Ross contained statements and representations which were not accurate.

1. It cannot be doubted, we think, that the agreement between the board of commissioners and the defendants to compromise or settle the controversy or dispute concerning the tax certificates held by the plaintiff, and the litigation then pending in reference thereto, is a valid and binding compromise and settlement, in view of what has been done under it, and the impossibility of restoring the parties to their former positions and rights, if the county commissioners had power to make it. There was at the time a bona fide dispute as to the validity of the taxes and tax certificates, and as to the rights of the county thereunder. A large part of these certificates were actually in litigation, and the

validity of the others was denied. There was therefore sufficient consideration to support the compromise agreement: *Smith v. Farra*, 21 Or. 395 (28 Pac. 241, 20 L. R. A. 115).

2. There is no charge that it was fraudulently made, but it was made in good faith, and has been executed. The money which the board of commissioners agreed to accept in full satisfaction of the rights of the plaintiff has been paid and retained. The appeal of the defendants then pending has been dismissed, and the decree of the circuit court become final. It is therefore too late for the county alone to repudiate the contract. The rights of the parties have become fixed, and they cannot be unsettled by one alone. If the plaintiff could rescind at all, it could not be done without restoring to the defendants what it had received under the agreement, and putting them in the position they were before the agreement was made—a manifest impossibility, as their rights under the then pending appeal cannot be restored. It would be unconscionable, therefore, for the plaintiff, if the board of commissions had power to make the agreement, to retain the fruits thereof, and, after the appeal of the defendants had been dismissed, and the decree of the circuit court adjudging the certificates to be valid had become final, to absolve itself from the burdens and obligations of the contract.

3. Nor does the fact that the compromise settlement or agreement included taxes and tax certificates not referred to in the proposition of Ross, nor involved in the pending litigation, alter the question. In making the settlement the county commissioners were not acting as a court, but as a mere financial or business agent of the county; and the contract actually made by them with the defendants, if they had power to make it, is binding, in the absence of fraud, although it may include matters outside the proposition of Ross and the pending litigation. Ross' petition was a mere proposition for a settlement of the controversy between him and the county, stating the terms upon which he was willing to make it. It was nothing more than merely opening negotiations on the subject, and the result of such negotiations is to be ascertained from the contract as actually made, and not from the initiatory proposition therefor. The question is not to be determined as if we were considering a

judgment or decree of a court outside the issues, or an award of arbitrators outside the contract of submission, but rather as an ordinary contract or agreement between parties. County commissioners, in transacting the business of the county, and in the care and management of its property and funds, do not act as a court, but as a financial or managing agent of the county, precisely as an agent of a private corporation in the management of its financial concerns, and all contracts made by them within the power conferred are subject to the same rules: *Stout v. Yamhill County*, 31 Or. 314 (51 Pac. 442); *Frankl v. Bailey*, 31 Or. 285 (50 Pac. 186). Nor is it of any consequence that the statements in the written proposition of Ross for the settlement as to the amount of taxes, tax certificates, etc., were not correct. There is no charge that they were made knowingly or for a fraudulent purpose, or with intent to deceive, or that the board of commissioners was in any way misled thereby. Indeed, it is difficult to understand how the commissioners could have been deceived, as all the matters referred to, and concerning which the parties were negotiating, were a part of the county records, and the commissioners knew or were charged with knowledge of the amount of the taxes and tax certificates held by the county, without relying on the statements of Ross or any one else.

4. We pass then to the question as to whether the board of county commissioners had power to make the compromise agreement and settlement with the defendants. This question does not, as seems to have been assumed, necessarily involve the power or authority to compromise or agree with the owner of property to accept in satisfaction of taxes an amount less than that levied or attempted to be levied against the property. In this case all the taxes had become delinquent, and the property had been sold and purchased by the county under the provisions of the act of 1893 (Laws 1893, p. 28), and had therefore "become the property of the county, * * subject to redemption as provided by law." By such a purchase a county acquires an interest in or a specific lien upon the property (*Berger v. Multnomah County*, 45 Or. 402 (78 Pac. 224), which is, of course, a valuable property right. The title and right of the plaintiff,

however, under the purchase made by it, were in dispute. A large part of the tax certificates were in actual litigation, and the validity of the remainder was denied. In making the contract of settlement, therefore, the board of commissioners were dealing with property rights belonging to the county, and which were in dispute and litigation. It is difficult to discover any legal principle which will deny to them the power to compromise and settle such a controversy, when, in their judgment, the best interests of the county require it. It would be unreasonable to hold that because a county, by direct legislative requirement, involuntarily becomes possessed of tax certificates which are of doubtful validity, and which involve and threaten to involve it in extensive and protracted litigation, it must go through such litigation, without the power of extricating itself therefrom by an honest and bona fide agreement with its adversary. Each county of the State is a body corporate, having certain prescribed powers. Among these is the power "to sue and be sued; * * to make all necessary contracts, and to do all other necessary acts in relation to the property and concerns of the county": B. & C. Comp. § 2518. All actions, suits or proceedings by or against a county are in the name of the county, but it is represented by the county court, which has authority and power to conduct and direct the proceedings therein as if it were plaintiff or defendant: B. & C. Comp. § 913. The powers of a county as a body politic can only be exercised by the county judge and the commissioners sitting for the transaction of county business, or by a board of county commissioners, who are, so to speak, a board of directors or managing agents of the corporation, which is the county, and, as such, "have the general care and management of the county property, funds, and business, where the law does not otherwise expressly provide" (B. & C. Comp. § 912, subd. 9), and the "power to compound for and release in whole or in part any debt or damages arising out of contract due the county, and for the sole use thereof, upon such terms as may be just and equitable": B. & C. Comp. § 912, subd. 10. It seems to us these provisions of the statute plainly conferred full power and authority upon the board of county commissioners to settle and adjust the pending controversy between it and the defendants

as to the validity of the tax certificates held by the county, and the rights of the respective parties thereunder.

Such seems to be the power of the county boards in other states under similar statutory provisions. Thus in Wisconsin the statute provides that the county board shall have authority "to make such orders concerning the corporate property of the county as they may deem expedient"; to "settle and allow all accounts, or demands, or causes of action against the county"; and to "have the care of the county property and the management of the business and concerns of the county in all cases." It was held there that under these provisions the county board had authority to settle and compromise a dispute or controversy between its county and an adjoining county as to the ownership of certain tax certificates, somewhat similar to the ones in question here (*Hall v. Baker*, 74 Wis. 118, 42 N. W. 104), and to compromise and settle a judgment against the county treasurer and his bondsmen for public moneys lost through depositing the same in an insolvent bank: *Washburn County v. Thompson*, 99 Wis. 585 (75 N. W. 309). In the case just referred to it is said that the power of the managing officers of a county to compromise and settle disputed or doubtful claims against the county is a necessary incident to the right to sue and be sued, and that such power exists and may be exercised at any time before the validity of the claim is fixed by final judgment, and thereafter in case of the insolvency of the debtor, citing 1 Beach, Pub. Corp. §§ 638, 639, and 1 Dillon, Mun. Corp. § 477. Missouri has a similar statutory provision as to the power of the county courts, and in *St. Louis, I. M. & S. Ry. Co. v. Anthony*, 73 Mo. 431, it was held that a county court may compromise and settle a judgment in favor of the county and against a taxpayer for taxes, which judgment had been reversed and remanded; the court saying: "The power to sue implies the power to accept satisfaction of the demand sued for, whether the precise amount demanded or less. The taxes were levied for the benefit of the county. The beneficial interest was in the county, and it is for the public interest that she should have the right to settle by compromise questionable demands which she may assert. Must the county prosecute doubtful claims at all hazards, regardless of costs and

expenses, and is it for the public good that the right to settle such demands by compromise be denied her? As was said by the Supreme Court of New York in the case of *Board of Supervisors v. Bowen*, 4 Lans. 31: 'It would be a most extraordinary doctrine to hold that, because a county had become involved in a litigation, it must necessarily go through with it to the bitter end, and has no power to extricate itself by withdrawal or by agreement with its adversary.' The same doctrine was sanctioned in *Supervisors v. Birdsall*, 4 Wend. 453."

The statutes of Iowa defining the powers and authority of the board of supervisors are substantially in the same language as B. & C. Comp. § 912, subd. 9, relating to county courts. It was held that the board of supervisors, if acting in good faith, had authority, under the powers thus conferred, to compromise a judgment in favor of the county for taxes, although the taxpayer was solvent and the judgment had become final (*Collins v. Welch*, 58 Iowa, 72, 12 N. W. 121, 43 Am. Rep. 111), and to compromise a pending action against the county for alleged services by conveying to the claimant certain swamp land belonging to the county (*Grimes v. Hamilton County*, 37 Iowa, 290), and to contract with a person to procure title to the county from the government to swamp lands, and, as compensation therefor, to have a part of the lands so secured: *Allen v. Cerro Gordo County*, 34 Iowa, 54. The statute of South Dakota declares that the board of county commissioners "shall superintend the fiscal affairs of the county and secure their management in the best manner." From this statutory injunction it was held implied authority was granted to dispose of and sell, in good faith and for value, outstanding, overdue and uncollectible promissory notes belonging to the county; the court saying: "The board, being charged exclusively with the management of all fiscal affairs pertaining to the county, has authority, unless restricted by the legislature, to do that which the county might perform if an entity and capable of rational action; and the proposition carries with it authority to compromise in an honest manner a disputed or doubtful claim in favor of or against the municipality: *State v. Davis*, 11 S. D. 111 (75 N. W. 897, 74 Am. St. Rep. 780). Such authority is an incident to official capacity and

the power to institute, prosecute, and defend suits": *Brown County v. Jenkins*, 11 S. D. 330 (77 N. W. 579). Bearing more or less directly upon this question, and tending to support the conclusions indicated, the following cases are cited: *Board of Orleans County v. Bowen*, 4 Lans. 24; *Town of Petersburg v. Mappin*, 14 Ill. 193 (56 Am. Dec. 501); *Fitzgerald v. Harms*, 92 Ill. 372; *Agnew v. Brall*, 124 Ill. 312 (16 N. E. 230); *Board v. Saunders*, 17 Ind. 437; *Supervisors v. Birdsall*, 4 Wend. 453; *City of Buffalo v. Bettinger*, 76 N. Y. 393; *McCredie v. City of Buffalo*, 2 How. Prac. (N. S.) 336; *O'Brien v. Mayor*, 40 App. Div. 331 (57 N. Y. Supp. 1039); *Woods v. Supervisors of Madison County*, 136 N. Y. 403 (32 N. E. 1011). From these authorities—and there seem to be none to the contrary—it is clear that, under the various provisions of the statute, the board of commissioners had power to make the compromise agreement or settlement sought to be canceled and annulled in this suit, unless some of the arguments of plaintiff hereafter noticed are sound.

5. It is insisted that the power given a county court by B. & C. Comp. § 912, subd. 10, to compound for and release in whole or in part, any debt or damages resulting out of a contract due the county, is equivalent to an implied denial of the power to compromise or settle any controversy or dispute arising in any other way. This position is grounded on the familiar rules of interpretation of statutes and contracts—that the expression of one thing excludes any other. This is a mere rule of interpretation, and, as said by Mr. Broom in his work on *Legal Maxims* (8 ed. *653): "Great caution is requisite in dealing with it, for, as Lord CAMPBELL, Ch., observed in *Saunders v. Evans*, it is not of universal application, but depends upon the intention of the party as discoverable upon the face of the instrument or of the transaction. Thus, where general words are used in a written instrument, it is necessary, in the first instance, to determine whether those general words are intended to include other matters besides such as are specifically mentioned, or to be referable exclusively to them, in which latter case only can the above maxim be properly applied." Mr. Endlich says, *Endlich, Interp. Stat.* § 398: "If there is

such a rule, it is confessedly liable to so many restrictions and exceptions in its application as to be practically swept away. Indeed, the extreme caution necessary in its application is emphasized wherever it is recognized by writers." Whether the expression of one thing in a statute is to operate as an exclusion of all others is a mere question of intention, to be ascertained by the usual means and rules of interpretation. For this purpose the maxim invoked becomes important. "It means," says Mr. Endlich, "that the special mention of one thing indicates that it was not intended to be covered by a general provision which would otherwise include it" (Section 399), and, "as applied to the construction of statutes, certainly cannot mean that, where one thing is allowed or named, every other thing is forbidden or excluded": Section 397. The rule may be applied in cases where there is a bare enumeration of powers, without any provision conferring a general power. For example, if there was no general power conferred upon the board of county commissioners in relation to the management and control of the fiscal affairs of the county, it might be said that the law giving them authority to compromise or compound a certain character of controversies would be equivalent to an intention of the legislature to exclude the power to compromise all other cases. But the powers given by Section 2518 and by Subdivision 9 of Section 912 are so broad as to clearly indicate that the legislature never intended to confine the cases in which the county courts might settle and adjust controversies between the county and other persons to the narrow limits mentioned in Subdivision 10 of Section 912. To deny the county court or the board of commissioners this right or power would be to deprive them of authority to act in numerous instances where the best interests of the county would be subserved, and require them to pay unjust and invalid claims against the county, or defend to a final conclusion all suits or actions brought against the county, without regard to the probability of a successful termination thereof, and contrary to its best interests. It is not to be supposed that the legislature intended so to circumscribe and restrict the powers of the county court in the management of the general fiscal and business affairs of the county.

6. It is also contended that the board of county commissioners had no authority to make any compromise in regard to the tax certificates, because they included taxes of other corporations—notably, the City of Portland, the Port of Portland and the school district. The law of 1893, authorizing the county judge to buy in property at delinquent tax sales, declares that when so purchased it will become the property of the county, subject to redemption, as provided by law. By such a purchase the county acquires an interest in or liens upon the property for the taxes assessed against it (*Berger v. Multnomah County*, 45 Or. 402, 78 Pac. 224), and we think it holds the same in trust to account to the other interested corporations for their proportions or shares of the taxes realized therefrom. The ownership of the interest and lien acquired by the purchase is, however, entirely vested in the county, and any disposition made of it or any redemption is placed exclusively under its control. This is a rational view of the act of 1893, and is the one given it by the subsequent act of 1901, which it was held in *Berger v. Multnomah County*, 45 Or. 402 (78 Pac. 224), was an important aid in ascertaining the intention of the legislature in the passage of the former act.

7. Again, it is claimed that the provision in the act of 1893 that the land purchased by the county shall be "subject to redemption as provided by law" is an effectual limitation upon the power of the county to deal with the tax certificates in any way except to allow a redemption, and denies to a taxpayer the right to settle or compromise with the county and relieve his property from the effect of the sale in any way other than by such redemption, however doubtful or uncertain the validity of the tax proceedings may be. We cannot agree in this view. It seems to us that the plain purpose of the clause referred to was to preserve to the taxpayer the right of redemption, and not to limit or restrict the powers of the county court or of the taxpayer to deal with the tax certificate. The statute provides that, upon the purchase of the land, it shall become the property of the county; and, without some provision as to redemption by the taxpayer, his rights to the property would probably be completely barred by the sale. The redemption clause was intended for his

benefit, and to give him a specific time after the sale in which to become repossessed of his property by redemption, but it does not prevent him from compromising or settling a dispute as to the validity of such sale or tax proceedings with the county authorities.

For these reasons, the decree of the court below will be reversed, and the complaint dismissed. **REVERSED.**

Decided 12 June, rehearing denied 17 July, 1905.

BUSCH v. ROBINSON.

81 Pac. 237.

MASTER AND SERVANT—COMPLAINT—INFERENCE OF RISK ASSUMED.

1. In an action by a servant for personal injuries, a complaint showing that a board in a platform on which plaintiff was compelled to stand while feeding a mangle in a laundry had been negligently allowed to become smooth and broken, so that while in the performance of her duty she slipped and fell forward, whereby her hand was caught between the rollers of the machine, is not insufficient after verdict on the ground that plaintiff must from the facts stated necessarily have known of the defect, and thereby assumed the risk involved.

SURGEON'S FEES AS AN ELEMENT OF DAMAGE.

2. In a case where one has been injured so that the fingers have become webbed, the expense of a surgical operation to divide the fingers and the necessary hospital charges are all proper elements of damage.

INJURY TO SERVANT—EVIDENCE—QUESTION FOR JURY.

3. The evidence in this case on all the questions involved was sufficient to require its submission to the jury, so that the motion for a directed verdict was properly refused.

STRIKING OUT ANSWER OF WITNESS—HARMLESS ERROR.

4. A witness having answered a leading question that called for information already before the jury, the court properly ordered it stricken out, and even if such an order was error, it was manifestly harmless.

MASTER AND SERVANT—SUPERINTENDENT.

5. A person employed in a laundry to oversee a mangle and direct the movements of the other persons employed at the machine is not, as a matter of law, a foreman or superintendent, charged with the duty of keeping the machine and its surroundings in proper condition.

ACADEMIC INSTRUCTIONS.

6. Requested instructions on abstract or theoretical propositions, or on matters not testified to by witnesses, should not be given.

From Umatilla: WILLIAM R. ELLIS, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is an action for damages by Margaret Busch against John F. Robinson. The plaintiff, an employee of the defendant, while at work in a laundry, of which the latter was proprietor, feeding a mangle, slipped, and, falling forward, her right hand was caught between the rollers and seriously injured. She attributes the cause of the injury to the negligence of the defend-

ant, and charges in her complaint that he kept and maintained a platform in front of the mangle, upon which the employees feeding the same were obliged to stand; that he carelessly and negligently suffered said platform to be and become in a broken and defective condition, and negligently suffered the same to be and become slippery and worn, and to have a hole therein, and did then and there carelessly fail to provide a safe place for plaintiff to perform her work, of all of which defendant then and there had knowledge; that being in the performance of her duties as an employee of the defendant, and while standing on said platform and feeding said machine, plaintiff's foot slipped into a cavity in said platform, caused by said broken and defective condition, whereby she lost her balance and fell forward, and her hand was caught in the rollers and injured as above indicated. She gave testimony tending to show that she had supervisory control over the girls working about the mangle, there being four at the time, including herself (two in front, feeding, and two upon the opposite side, folding the fabrics as they came away); that her especial duty otherwise was to assist in folding, but that whenever occasion required, in furtherance of her duty in supervising the work she assisted in feeding as well; that on the evening of the accident the girls were working overtime, and plaintiff was in a hurry to get through, as she had been directed by the defendant, who had general superintendence about the laundry, to complete the work in hand before closing down; that, observing that one of the girls at the machine was not working as expeditiously as she should, plaintiff changed places with her, and directed her to fold while she fed the machine in her stead; that presently she missed the girl from her work, and, with a view to ascertaining her whereabouts, raised on her tiptoes, at the same time looking over the machine, when she was precipitated forward and her hand was drawn between the rollers and crushed and burned. Plaintiff testified that her "foot slipped in the knothole and she fell into the machine."

The plaintiff and a Mrs. Lewis, who was her principal witness, aside from herself, described the defect finally as being a knot in the board forming the platform, which stood about four

inches from the floor, from which the board was split on each side for the distance of about a foot, and that the broken segment sprang down under the tread, permitting the foot to slip into the space, which was about three inches in width. They each gave out as first impression that the defect was a split from a knothole, but, when their attention was called explicitly to it, they testified that it was a split from a knot yet remaining in the board. They further testified that from long use the board had worn smooth and become slippery. Plaintiff further testified that her foot went into the opening to her instep; that she did not know of the defect; that her attention had not been called to it although she knew of the knot; that she could see the platform, but did not remember the break being there; that she supposed she could have seen it if her attention had been called to it, but it never had; that she was seldom on that side of the machine; that she had no recollection of seeing the break before she was hurt; and that the place was shaded. Mrs. Lewis testified that she was aware of the defect, and that it had existed for some time, but that her attention was not called especially to it until plaintiff was hurt. The machine was four feet three or six inches in height, and eight feet in length. At the close of the plaintiff's case there was a motion for nonsuit, which being denied, the trial was completed, resulting in a judgment for plaintiff, from which the defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Carter & Raley* and *Balleray & McCourt*, with an oral argument by *Mr. John McCourt*.

For respondent there was a brief over the name of *Hailey & Lowell*, with an oral argument by *Mr. Stephen Arthur Lowell*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

1. The first assignment of error relates to the overruling of a demurrer to the complaint, and it is now urged that it is insufficient after verdict, in that it does not state that plaintiff was without knowledge of the defective and broken board while using the platform, or, stating the contention more precisely, that having shown that the defendant suffered the platform

whereon she was to stand in doing her work to become and remain in a broken condition, without having stated more, it must be assumed that the defect was open and obvious, and, of course, that the plaintiff saw and observed it, and therefore had knowledge of it, and that, in proceeding to work on the platform with such knowledge, she voluntarily assumed the risk, and hence that the defendant is not liable upon the face of the complaint. An assumption of risk is characterized as a sort of estoppel against claiming damages for injuries received, which arises from contract, by engaging or consenting to work about a defective machine or with a defective appliance: Beach, Contrib. Neg. § 16. It is urged that it is inferable from the showing that the platform was broken or defective and had a hole in it that plaintiff had knowledge of the condition, but such a result does not necessarily follow. The manner of the break or defect is not further or specifically described. We may assume that plaintiff knew of the knothole or the knot, as some of the witnesses indicate it was, and yet she may not have known or realized the real extent or dangerous character of the defect. If the complaint had described the imperfection as the testimony tends to show it to have existed, it was rather of a latent character than one open and obvious to the sense of sight, and only made itself fully manifest under the tread of the foot. This serves to demonstrate that the inference of knowledge cannot be certainly deduced from the specifications of the defect, and after verdict we think the complaint is sufficient.

2. The next question in the order of trial arises upon the admission over objection of certain testimony of Dr. C. J. Smith. After describing the extent of the injury to the plaintiff's hand, and that there was a webbing of the fingers down to the middle joint, he testified that the cosmetic effect of the hand could be improved by an operation dividing the fingers again so that she could wear a glove; that, while it would probably not improve the usefulness of the hand, it would much improve its appearance; and that the reasonable charges of a surgeon for performing the operation would be about \$100. He further testified, over objection, that it would be better for the plaintiff to go to a hospital during the operation and treatment, and that the

expense there would be two dollars a day for about 30 days. The objection to this testimony is that the expense attending the further treatment of plaintiff's hand to improve its appearance is not a proper element of damages for the jury's consideration. It would seem that the operation or further treatment and the expense attending it would be but the natural and probable result of the injury—as much so, almost, as it was necessary to employ a surgeon in the first instance to secure proper treatment for saving the hand, if possible. It was therefore within the rule for the measure of damages: 20 Am. & Eng. Enc. Law (2 ed.), 157.

3. The next question in such order arises upon the motion for a nonsuit. Much the same argument is advanced for defendant in support of the motion as in support of the assignment of error with relation to the demurrer, but it is supplemented by the further contention that plaintiff was guilty of contributory negligence. It was the duty of the defendant to furnish the plaintiff a safe place in which to work, and safe appliances to work with. This, as a principle of law obtaining between master and servant, is conceded. The contention involves three elements of inquiry: (1) Was the defect open and obvious? If not (2), did the plaintiff have knowledge of it, and continue in her employment with such knowledge? and (3) did the defendant have knowledge thereof, or should he have known of it if he had been reasonably diligent and cautious in observing the condition of the machine and its appliances, for the protection of his employees?

All these are matters of fact for the determination of the jury. The testimony of plaintiff would indicate that the defect was not open and obvious, as she had not observed it prior to the accident; and, as described by her and Mrs. Lewis, it was latent in character, rather than otherwise. Although Mrs. Lewis had taken note of it previously, her testimony, to say the least, was susceptible of different inferences in that relation, and was properly for the jury, and not for the court.

As it pertains to the negligence of the plaintiff, it is said she should not have been tiptoeing and peering about, looking for the girl who had deserted her post, but should have gone around

the machine to find her, but this is only matter of argument upon the testimony for the persuasion of the jury. It was certainly not negligence per se for her to do this in pursuance of her duty to supervise the work of those helping about the machine. If she could see the girl from where she stood, and call her back to her work, it would certainly have been as expedient for her to have done so as to have left her own work and gone after her. The discussion simply serves to demonstrate that the question was one of fact purely for the jury.

About the last element, suffice it to say that there was testimony submitted to the jury having a tendency to show that, if the defendant did not have actual knowledge of the defect, he could have known of it if he had taken proper precautionary measures. The legal principles applicable have been settled by the decisions of this court, and it is unnecessary that we re-enforce them by further discussion: *Wild v. Oregon Short Line Ry. Co.* 21 Or. 159 (27 Pac. 954); *Johnston v. Oregon Short Line Ry. Co.* 23 Or. 94 (31 Pac. 283); *Stager v. Troy Laundry Co.* 38 Or. 480 (63 Pac. 645, 53 L. R. A. 459); *Müller v. Inman*, 40 Or. 161 (66 Pac. 713); *Duff v. Willamette Iron Works*, 45 Or. 479 (78 Pac. 363, 17 Am. Neg. Rep. 121).

4. Another assignment of error relates to the striking out of an answer made by Miss Neil, a witness for the defendant. She testified without objection that she called on the plaintiff a few days after her injury, and talked with her about her hand; that she told her about the matter of the accident; that she did not remember the exact words plaintiff used about being hurt, but that she gave witness the impression that it was her carelessness that caused the accident that caused the injury to her hand. She was then asked the following question: "And the substance of her conversation was that the accident happened through her own carelessness?" An objection to the question being sustained, she was again asked: "Was that the substance of her conversation?" And she answered: "Yes, sir." It was this answer that the court struck out, and of which complaint is made. Two reasons exist why the action of the court was not prejudicial error: (1) The substance of the conversation had already gone to the jury without objection; and (2) she should have been

asked to give the conversation, or at least the substance of it, so that the manner of the question was obnoxious because leading.

Another exception was saved to a question propounded to Mrs. Millie Busch, on rebuttal, intended for the impeachment of J. C. Boothby, a witness for defendant, in one phase of his testimony. It was not well taken, however, as the proper ground for the question appears to have been laid.

5. Exceptions were taken to instructions numbered 1 to 7, inclusive, upon the ground that under the testimony they are abstract and without special application to the case. The reason urged why they are abstract is that the plaintiff was not an ordinary employee, but a departmental manager or superintendent, and was charged with the same knowledge, care and precaution as the general manager. This is a misapprehension of the status of the case. The plaintiff was given supervisory control about the machine. She says:

"I was head girl on the machine. * * It was my duty to see that the girls were all at work. * * He [Robinson], as a rule, was superintending the whole laundry, and has been all the time."

On cross-examination she continues:

"I was foreman of the machine. * * I was head lady. * * I was in charge of the whole thing and the six girls. * * My business was to look after the machine, to see that the work was done on it, and that the girls were working. * * It was my duty to see that the girls were employed."

But her control did not extend, as we infer, to keeping the machine in order or to supervising its management. That was left to the defendant himself, who retained general supervisory control over his entire laundry business. To say the least, here was matter of inquiry for the jury, and, being such, the instructions were not vulnerable to the objections.

It is also urged here that the defects complained of were open and obvious, but this we have found to be also a question for the jury.

6. The next assignment of error is relative to the instructions requested by defendant, namely:

"There is no rule of law which places a woman under any different circumstances than a man, with reference to the dan-

gers which she may be exposed to in working for an employer. She is subject to the same rules and conditions, and the same rule of law applies to her that applies to a man. It is her duty to observe and protect herself against dangers which are plainly obvious, or which ought to have been observed and noticed. If she suffers any injury by reason of her failure to observe the dangers which are in sight, she cannot recover."

As counsel concede, however, the trial court was not bound to give this instruction. It was requested, we gather, on account of the argument of counsel for plaintiff to the jury to the effect that a woman was not as thoughtful as a man, but was controlled and governed more by impulse. There was, however, no testimony in the case upon the subject, and the instruction was not vital to any question made on the trial.

Finding no error, the judgment of the trial court will be affirmed.

AFFIRMED.

Argued 13 April, decided 12 June, 1905.

KEMP v. POLK COUNTY.

81 Pac. 240.

ROAD OF PUBLIC EASEMENT TO RESIDENCE—REFUSAL TO CONFIRM REPORT OF VIEWERS FOR INADEQUACY OF DAMAGES.

1. Under Section 22 of the act of 1903, relating to the establishment of roads from existing legal public roads to isolated residences (Laws 1903, pp. 262, 269), the county court cannot refuse to confirm the report of the viewers because the damages allowed are inadequate, where that fact must be shown by evidence.

SUFFICIENCY OF PETITION FOR ROAD TO PRIVATE RESIDENCE.

2. A petition for the location of a road from an existing legal public road to an isolated residence under Laws 1903, pp. 262, 269, § 20, need not contain any facts or statements other than those required by the statute.

REPORT OF VIEWERS AS TO LOCATION OF ROAD TO RESIDENCE.

3. Under Section 21 of the act of 1903, relating to the laying out of a road from an existing legal public road to an isolated residence, the viewers need not locate such road on the most desirable route, since the statute does not so require.

From Polk: REUBEN P. BOISE, Judge.

Statement by MR. JUSTICE BEAN.

This proceeding was instituted by Mary Kemp against Jos. W. Brown and Polk County, in the county court of said county, under Section 20 of the road laws of 1903 (Laws 1903, pp. 262, 269), for the location of a public road or gateway from the residence of the petitioner through and across the land of the defendant to a public highway. Upon the filing of the petition the county court ordered the board of county road viewers to

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meet at a specified time, and view out such road or gateway, and assess the damages which defendant would sustain thereby. A copy of the order was served on the defendant, and on the day designated the viewers proceeded to view and lay out a public road or gateway 16 feet wide from the residence of the petitioner through and across the land of the defendant to the county road, and assessed his damages in the sum of \$100. The report of the viewers was filed on the 21st of November, 1903, and on the 24th of that month the petitioner paid in full the cost of locating the road, and deposited with the county clerk for the defendant the sum of \$100, the amount of damages assessed to him. On December 3d the defendant appeared in the county court and moved to set aside the report of the viewers on the grounds: First, that the petition for the location of the road was insufficient to authorize the appointment of viewers; second, that the road as located does not conform to the statute, because it does not give the public ingress to and egress from the petitioner's residence; third, that the report of the viewers does not show that ingress to or egress from the residence of the petitioner to a public highway could not be had through land other than that of the defendant, with less damage to him, and with greater convenience to the public and to the petitioner; and, fourth, that the report is unjust, and not in conformity with the law. This motion was sustained on the ground and for the reason that the report of the viewers was unjust, but overruled in every other respect. The petitioner thereupon moved for an order requiring the viewers to again view and locate a road and assess the damages, but this was denied, and the proceeding dismissed. The matter was thereupon brought to the circuit court by writ of review, where the order of the county court was reversed, and the cause remanded, with directions to confirm the report of the viewers, and order the gateway located. From this judgment the defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *John H. McNary*, District Attorney, *W. H. Holmes* and *Webster Holmes*, with an oral argument by *Mr. William Henry Holmes*.

For respondent there was a brief over the names of *Oscar Hayter* and *Earl C. Bronaugh*, with an oral argument by *Mr. Hayter*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. The principal question on this appeal is whether a county court can refuse to confirm the report of viewers appointed to assess damages to a landowner in the matter of the location of a road of public easement on the ground that, in its opinion, the damages assessed are inadequate, when that fact does not appear from the face of the report, but must be shown by evidence aliunde. This same question was presented and decided in *Fanning v. Gilliland*, 37 Or. 369 (61 Pac. 636, 62 Pac. 209, 82 Am. St. Rep. 758), and that decision is controlling here. That, like this, was a proceeding for the location of a road of public easement. On the coming in of the report of the viewers appointed to assess damages to the lands over which the road was to be located, the landowners appeared and objected to the confirmation of the report, and asked that they be allowed to produce evidence that it was unjust. This was denied, and on appeal to this court the decision was affirmed; the court saying: "Nor do we think that the objectors were entitled to a hearing upon the justice [justness] of the viewers' report. That is a matter to be determined from the report itself, and it cannot be disputed by any method not prescribed by statute." The *Fanning* case was based on a consideration of Section 4077 of Hill's Ann. Laws of Oregon of 1892, but that section was subsequently embodied in the road law of 1903, without amendment or change, so far as the question involved is concerned, and therefore must receive the same construction. A significant fact in this connection is that by the act of 1903, the legislature provided or attempted to provide for an appeal to the county court from the assessment of damages by the road viewers in the location of a public county road, but omitted to do so in roads of public easement, thus indicating an intention not to disturb in that class of cases the rule laid down in the *Fanning* case.

2. Objection is made to the sufficiency of the petition for the location of the road, because it is said that it does not appear that

the premises of the petitioner are not accessible from some public thoroughfare, or that the gateway petitioned for is on the most accessible or desirable route. The petition conforms to the requirements of the statute. It describes the location of the residence of the petitioner, states that such residence is not reached by any convenient public road heretofore provided for by law and that it is necessary that the public and the petitioner should have ingress to and egress from the residence of such petitioner, described the route of the proposed road, the land over which it is to be located, and the ownership of such land. This is as much as the statute requires, and is sufficient: Section 20, Laws 1903, pp. 262, 269; *Towns v. Klamath County*, 33 Or. 225 (53 Pac. 604).

3. Nor is it necessary that the report of the viewers show that the road located by them is on the most accessible or desirable route. They are required by law to locate a road "so as to do the least damage," and this fact appears from the report.

AFFIRMED.

Argued 28 March, decided 22 May, rehearing denied 28 August, 1905.

ABBOT v. OREGON RAILROAD CO.

80 Pac. 1012, 1 L. R. A. (N. S.) 851, 39 Am. & Eng. R. Cas. (N. S.) 52.

CARRIERS—DUTY TO LIGHT STATIONS AND PLATFORMS.*

1. A carrier of passengers by rail is bound to exercise reasonable care to keep its platforms, approaches and station grounds, so far as passengers would naturally resort to them, properly lighted at night for a reasonable time, as determined by the circumstances of the case, the size and importance of the station, and the business done there, next prior to the arrival and immediately following the departure of a passenger train scheduled to stop at the station during the night.

PASSENGER AT STATION—RELATION OF TO CARRIER.

2. A passenger who has completed his journey and alighted from the train at the station is allowed a reasonable time to leave the premises, and an intending passenger may occupy the depot waiting room a reasonable time immediately preceding the arrival of his train, during which he occupies a relation towards the carrier analogous to that of a passenger.

*NOTE.—As to the Duty of Carriers to Keep Stations and Platforms Lighted and in Safe Condition, see notes in 3 L. R. A. 75; 6 L. R. A. 193; 20 L. R. A. 520; 57 L. R. A. 390; 16 Am. St. Rep. 325; 42 Am. St. Rep. 522; 90 Am. St. Rep. 818; 101 Am. St. Rep. 390; and 39 Am. & Eng. R. Cas. (N. S.) 52. See, also, note in 1 L. R. A. (N. S.) 851, discussing "What Is a Reasonable Time Prior to the Arrival or Departure of Trains to Keep a Station Open, Lighted and Heated."

As to the Duty of a Carrier to Maintain Safe Approaches Beyond Its Own Premises, see note in 16 L. R. A. 593.

REPORTER.

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DUTY TO PERSON PERMITTED TO REMAIN IN STATION OR CAR.

3. A carrier owes to one whom it permits to remain in and about its station while waiting for a train not due for some time the same protection and care that is due a passenger, and the same duty exists toward one allowed to remain in a car after arriving at the destination of the train.

DUTY TO LIGHT STATION PLATFORM FOR SPECIAL PASSENGER.

4. The knowledge of a train dispatcher that passengers arriving on a special train over another road at night intend to take a train on his road, does not bind his road to light its depot platform until a reasonable time prior to the arrival of its train.

DUTY TO LIGHT STATION PLATFORM—QUESTION FOR JURY.

5. Whether a given period of time prior to the arrival of a night passenger train was a reasonable period during which the station platform should have been kept lighted is a question for the jury, being one of fact.

CARRIERS—RIGHT OF PASSENGER TO LEAVE AND RE-ENTER CONVEYANCE.

6. A passenger may leave the car or boat on which he is traveling to transact his private business at any intermediate station or landing where a stop is made for any reasonable time to receive or discharge passengers, and if he is injured without his fault, in consequence of the carrier's negligence on any part of the premises set apart by it for the use of the public, or so used with its consent, he may recover the damages sustained.

CARRIERS—RIGHT TO EXERCISE ON DARK PLATFORM—CONTRIBUTORY NEGLIGENCE.

7. A passenger, waiting at a station on a dark night for his train, who is permitted to remain in a well-lighted car provided with necessary conveniences, is guilty of contributory negligence where he leaves the car to walk on the unlighted station platform merely for exercise.

From Sherman: WILLIAM L. BRADSHAW, Judge.

Statement by MR. JUSTICE MOORE.

This is an action by George Abbot against the Oregon Railroad & Navigation Co. and the Columbia Southern Railway Co. to recover damages for a personal injury alleged to have been sustained by plaintiff while a passenger of the defendant companies, and caused by their negligence in failing to maintain a railing at, and in omitting to keep a lamp burning on, a depot platform jointly used by them. The defendants, separately answering, denied the material allegations of the complaint, and for further defenses averred that plaintiff, at the time he was injured, was not a passenger of either company, and that his hurt was caused by his own want of care. The allegations of new matter in the answer having been denied in the replies, the cause was tried, and judgment rendered against the defendants, or either of them, for the sum of \$20,000, and they severally appeal.

REVERSED.

For appellant Columbia Southern Ry. Co. there was an oral argument by *Mr. Zera Snow*, with a brief over the name of *Snow & McCamant*, to this effect.

I. The obligation of a carrier to keep its terminals safe for the reception of passengers is limited to a reasonable time before the arrival and after the departure of trains on which such passengers are to be carried: *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159 (5 Am. St. Rep. 354, 4 So. 359); *Johnson v. Boston & M. R. Co.* 125 Mass. 75; *Hodges v. New Hanover T. Co.* 107 N. C. 576 (12 S. E. 597); *Illinois Cent. R. Co. v. Lalage*, 113 Ky. 896 (62 L. R. A. 405, 69 S. W. 795).

II. Those who come to a railway station at other times, without business requiring them to come, are mere licensees, to whom the carrier owes no duty except to refrain from wantonly injuring them: *Pittsburg, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364 (23 Am. Rep. 751); *Cincinnati, H. & D. R. Co. v. Aller*, 64 Ohio St. 183 (60 N. E. 205); *Gillis v. Pennsylvania R. Co.* 59 Pa. 129 (98 Am. Dec. 517); *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258 (47 Am. Rep. 706); *Burbank v. Illinois Cent. R. Co.* 42 La. Ann. 1156 (11 L. R. A. 720, 8 So. 580); *Faris v. Hoberg*, 134 Ind. 269 (39 Am. St. Rep. 261, 33 N. E. 1028); *Woodruff v. Bowen*, 136 Ind. 431 (22 L. R. A. 198, 34 N. E. 1113); *Schmidt v. Bauer*, 80 Cal. 565 (5 L. R. A. 580, 22 Pac. 256); *Converse v. Walker*, 30 Hun, 596; *Larmore v. Crown Point Iron Co.* 101 N. Y. 391 (54 Am. Rep. 718, 4 N. E. 752); *Trask v. Shotwell*, 41 Minn. 66 (42 N. W. 699); *Heinlein v. Boston & Prov. R. Co.* 147 Mass. 136 (9 Am. St. Rep. 676, 16 N. E. 698); *Redigan v. Boston & M. R. Co.* 155 Mass. 44 (14 L. R. A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133); *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60 (38 L. R. A. 573, 66 Am. St. Rep. 856, 41 S. W. 62); *Clark v. Howard*, 88 Fed. 199 (31 C. C. A. 454, 60 U. S. App. 32).

III. One who comes to a railway station as a passenger, and remains there longer than is reasonably necessary, or wanders about the platform for a purpose not related to his journey, thereupon becomes a mere licensee, in like manner as if his original entry had been unconnected with any business with the

carrier: *Heinlein v. Boston & P. R. Co.* 147 Mass. 136 (9 Am. St. Rep. 676, 16 N. E. 698); *Cincinnati, H. & D. R. Co. v. Aller*, 64 Ohio St. 183 (60 N. E. 205); *Imhoff v. Chicago & M. R. Co.* 20 Wis. 344; *Chicago, K. & W. R. Co. v. Frazier*, 55 Kan. 582 (40 Pac. 923).

IV. A party who wanders about on an elevated railway platform on a dark night, at a time when he is neither alighting from nor boarding a train, and who falls off the platform, is precluded from recovering by his own contributory negligence: *Massey v. Seller*, 45 Or. 267 (77 Pac. 397); *Missouri, K. & T. R. Co. v. Turley*, 85 Fed. 369 (29 C. C. A. 196, 56 U. S. App. 1); *Sturgis v. Detroit, H. G. & M. R. Co.* 72 Mich. 619 (40 N. W. 914); *Bedell v. Berkey*, 76 Mich. 438 (15 Am. St. Rep. 370, 43 N. W. 308); *Bradley v. Grand Trunk R. Co.* 107 Mich. 243 (65 N. W. 102); *Emery v. Chicago, M. & St. P. R. Co.* 77 Minn. 465 (80 N. W. 627); *Graham v. Pennsylvania Co.* 139 Pa. 149 (12 L. R. A. 293, 21 Atl. 151); *Reed v. Axtell*, 84 Va. 231 (4 S. E. 587); *Gulf, C. & S. F. R. Co. v. Hodges* (Tex. Civ. App.) 24 S. W. 563; *International & G. N. R. Co. v. Folliard*, 66 Tex. 603 (59 Am. Rep. 632, 1 S. W. 624); *Bennett v. New York, N. H. & H. R. Co.* 57 Conn. 422 (18 Atl. 668); *Hilsenbeck v. Guhring*, 131 N. Y. 674 (30 N. E. 580); *Forsythe v. Boston & A. R. Co.* 103 Mass. 510; *Louisville & N. R. Co. v. Ricketts*, 96 Ky. 44 (27 S. W. 860); *Wood v. Richmond & D. R. Co.* 100 Ala. 660 (13 So. 552); *St. Louis, I. M. & S. R. Co. v. Cox*, 60 Ark. 106 (29 S. W. 38); *Gunderman v. Missouri, K. & T. R. Co.* 58 Mo. App. 370; *Waterbury v. Chicago, M. & St. P. R. Co.* 104 Iowa, 32 (73 N. W. 341).

For appellant Oregon Railroad & Navigation Co. there was an oral argument by *Mr. William Wick Cotton*, with a brief over the names of *W. W. Cotton* and *H. F. Connor*, to this effect.

A. Plaintiff at the time of the injury was at most a licensee: *Johnson v. Boston & M. R. Co.* 125 Mass. 75; *Heinlein v. Boston & P. R. Co.* 147 Mass. 136 (9 Am. St. Rep. 676, 16 N. E. 698); *Georgia R. & Bkg. Co. v. Richmond*, 98 Ga. 495 (25 S. E. 565); *Brunswick & W. R. Co. v. Moore*, 101 Ga. 684 (28 S. E. 1000); *O'Donnell v. Chicago & N. W. R. Co.* 106 Ill. App. 287; *Illinois*

Cent. R. Co. v. O'Keefe, 168 Ill. 115 (39 L. R. A. 148, 61 Am. St. Rep. 68, 48 N. E. 294); *Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 478 (54 L. R. A. 827, 60 N. E. 818); *Bricker v. Philadelphia & R. R. Co.* 132 Pa. 1 (19 Am. St. Rep. 585, 18 Atl. 983); *Hasse v. Oregon R. & Nav. Co.* 19 Or. 354 (24 Pac. 238); *Simmons v. Oregon R. & Nav. Co.* 41 Or. 151 (69 Pac. 440, 1022); *Pittsburg, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364 (23 Am. Rep. 751).

B. No recovery can be had by a licensee for a mere omission; there must be some positive act of misconduct: *Nicholson v. Erie R. Co.* 41 N. Y. 525; *Splittorf v. State*, 108 N. Y. 205 (15 N. E. 322); *Cusick v. Adams*, 115 N. Y. 55 (12 Am. St. Rep. 772, 21 N. E. 673); *Sterger v. Van Sicklen*, 132 N. Y. 499 16 L. R. A. 640, 28 Am. St. Rep. 594, 30 N. E. 987); *Severy v. Nickerson*, 120 Mass. 306 (21 Am. Rep. 514); *Heinlein v. Boston & P. R. Co.* 147 Mass. 136 (9 Am. St. Rep. 676, 16 N. E. 698); *Reardon v. Thompson*, 149 Mass. 267 (21 N. E. 369); *Redigan v. Boston & M. R. Co.* 155 Mass. 44 (14 L. R. A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133); *Sullivan v. Boston & A. R. Co.* 156 Mass. 378 (31 N. E. 128); *Plummer v. Dill*, 156 Mass. 426 (32 Am. St. Rep. 463, 31 N. E. 128); *Blackstone v. Chelmsford Foundry Co.* 170 Mass. 321 (49 N. E. 635); *Hathaway v. New York, N. H. & H. R. Co.* 182 Mass. 286 (65 N. E. 387); *King v. Central R. Co.* 107 Ga. 754 (33 S. E. 839); *Post v. Texas & P. R. Co.* (Tex. Civ. App.) 23 S. W. 708; *Woolwine v. Chesapeake & O. R. Co.* (*Manning v. Chesapeake & O. R. Co.*) 36 W. Va. 329 (16 L. R. A. 271, 32 Am. St. Rep. 859, 15 S. E. 81); *Pittsburg, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364 (23 Am. Rep. 751); *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368 (87 Am. Dec. 644).

C. A railroad company is bound to exercise only reasonable care to keep its premises in a safe condition: *Moreland v. Boston & P. R. Corp.* 141 Mass. 31 (6 N. E. 225); *Batton v. South & North Ala. R. Co.* 77 Ala. 591 (54 Am. Rep. 80); *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258 (47 Am. Rep. 706); *Knight v. Portland, S. & P. Co.* 56 Me. 234 (96 Am. Dec. 449); *Gunderman v. Missouri, K. & T. R. Co.* 58 Mo. App. 370; 1 Thompson, Negligence, p. 314.

D. A railroad company is under no obligation to keep its station platform lighted, except during a reasonable time before and after the departure or arrival of its trains: *Brunswick & W. R. Co. v. Moore*, 101 Ga. 684 (28 S. E. 1000); *Illinois C. R. Co. v. Lalage*, 113 Ky. 896 (62 L. R. A. 405, 69 S. W. 795); *Sargent v. St. Louis & S. F. R. Co.* 114 Mo. 348 (19 L. R. A. 460, 21 S. W. 823, 73 Am. Dec. 337); *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448 (54 Am. Rep. 72); *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159 (5 Am. St. Rep. 354, 4 So. 359); *Harris v. Stevens*, 31 Vt. 79; *Heinlein v. Boston & P. R. Co.* 147 Mass. 136 (9 Am. St. Rep. 676, 16 N. E. 698); *Grimes v. Pennsylvania Co.* 36 Fed. 72.

E. Even though plaintiff was a passenger, he should have exercised due care: *Finseth v. Suburban R. Co.* 32 Or. 1 (39 L. R. A. 517, 51 Pac. 84); *Sargent v. St. Louis & S. F. R. Co.* 114 Mo. 348 (19 L. R. A. 460, 21 S. W. 823); *Lafling v. Buffalo & S. W. R. Co.* 106 N. Y. 136 (60 Am. Rep. 433, 12 N. E. 599); *St. Louis, I. M. & S. R. Co. v. Cox*, 60 Ark. 106 (29 S. W. 38); *Waterbury v. Chicago, M. & St. P. R. Co.* 104 Iowa, 32 (73 N. W. 341); *Graham v. Pennsylvania Co.* 139 Pa. 149 (12 L. R. A. 293, 21 Atl. 151); *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439 (24 L. Ed. 506).

F. Plaintiff's contributory negligence is a complete bar to his recovery: *Walsh v. Oregon Ry. & Nav. Co.* 10 Or. 250; *Eaton v. Oregon Ry. & Nav. Co.* 19 Or. 391 (24 Pac. 415); *Massey v. Seller*, 45 Or. 267 (77 Pac. 397); *Missouri, K. & T. Ry. Co. v. Turley*, 85 Fed. 369 (29 C. C. A. 196, 56 U. S. App. 1); *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439 (24 L. Ed. 506); *Johnson v. Ramberg*, 49 Minn. 341 (51 N. W. 1043); *Emery v. Chicago, M. & St. P. R. Co.* 77 Minn. 465 (80 N. W. 627); *Sullivan v. Minneapolis, St. P. & S. S. M. R. Co.* 90 Minn. 390 (101 Am. St. Rep. 414, 97 N. W. 114); *Tanner v. Louisville & N. R. Co.* 60 Ala. 621; *Woodward Iron Co. v. Jones*, 80 Ala. 123; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708 (4 L. R. A. 710, 13 Am. St. Rep. 84, 6 So. 277); *Chewning v. Ensley R. Co.* 100 Ala. 493 (14 So. 204); *Wood v. Richmond & D. R. Co.* 100 Ala. 660 (13 So. 552); *Louisville & N. R. Co. v. Ricketts*, 96 Ky. 44 (27 S. W. 860); *Splittorf v. State*, 108 N. Y. 205 (15 N. E. 322);

Laffin v. Buffalo & S. W. R. Co. 106 N. Y. 136 (60 Am. Rep. 433, 12 N. E. 599); *Waterbury v. Chicago, M. & St. P. R. Co.* 104 Iowa, 32 (73 N. W. 341); *Forsyth v. Boston & A. R. Co.* 103 Mass. 510; *Bradley v. Grand Trunk R. Co.* 107 Mich. 243 (65 N. W. 102); *Bedell v. Berkey*, 76 Mich. 435 (15 Am. St. Rep. 370, 43 N. W. 308); *Graham v. Pennsylvania Co.* 139 Pa. 149 (12 L. R. A. 293, 21 Atl. 151); *International & G. N. R. Co. v. Folliard*, 66 Tex. 603 (59 Am. Rep. 632, 1 S. W. 624); *Gulf, C. & S. F. R. Co. v. Hodges* (Tex. Civ. App.), 24 S. W. 563; *Gunderman v. Missouri, K. & T. Ry. Co.* 58 Mo. App. 370; *Bennett v. New York, N. H. & H. R. Co.* 57 Conn. 422 (18 Atl. 668); *Toomey v. London B. & S. C. R. Co.* 3 C. B. N. S. 146; *Reed v. Artell*, 84 Va. 231 (4 S. E. 587); *Pollich v. Sellers*, 42 La. Ann. 623 (7 So. 786); *Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 Ark. 106 (2 S. W. 505); *Beach*, Contrib. Neg. (2 ed.), § 37.

For respondent there was an oral argument by *Mr. Alfred Silas Bennett*, with a brief over the name of *Bennett & Sinnott*, to this effect.

1. A common carrier is bound to use at least ordinary care in making its depots and platforms safe for passengers arriving at or about to depart from its stations: *Skottowe v. Oregon Short Line R. Co.* 22 Or. 430, 443 (16 L. R. A. 593, 10 Am. Neg. Cas. 44, 30 Pac. 222); *Bueneman v. Railroad Co.* 32 Minn. 390 (20 N. W. 379); *Louisville, N. A. & C. Ry. Co. v. Lucas*, 119 Ind. 583 (6 L. R. A. 193, 21 N. E. 968); *Moses v. Railway Co.* 39 La. Ann. 649 (4 Am. St. Rep. 231); *Patterson*, *Railway Law*, §§ 251 and 255; 3 *Thompson*, *Negligence* (2 ed.), § 3060; *Hutchinson*, *Carriers*, 417, 418; *Wallace v. Wilmington & D. R. Co.* 8 Houst. 529 (18 Atl. 818); *Seymour v. Railroad Co.* 3 Biss. 43.

2. A passenger is not compelled to remain in the coaches or even waiting rooms of a railroad company at stations along his journey, or at the depot of connecting lines. He has a right, on the contrary, to leave the car when it is stopped at a station or a waiting room, for the purpose of taking exercise, talking with his friends, attending to business, or any other proper purpose,

and in so doing he does not lose his character of passenger, or waive the exercise of ordinary care on the part of the railroad company in the matter of its stations and approaches: *Dice v. Willamette Transp. Co.* 8 Or. 60 (34 Am. Rep. 57, 6 Am. Neg. Cas. 202); *Hrebik v. Carr*, 29 Fed. 298; *Alabama G. S. Ry. Co. v. Coggins*, 88 Fed. 458 (32 C. C. A. 1); *Riley v. Railway Co.* 39 Ind. 568; *Louisville, N. A. & C. Ry. Co. v. Lucas*, 119 Ind. 583 (6 L. R. A. 193, 21 N. E. 968); *Louisville, N. A. & C. Ry. Co. v. Tredway*, 143 Ind. 475 (40 N. E. 807, 41 N. E. 794); *Knight v. Railway Co.* 56 Me. 234 (96 Am. Dec. 449); *Keefe v. Railway Co.* 142 Mass. 251; *Dodge v. Railway Co.* 148 Mass. 207 (19 N. E. 373); *Chicago, etc., Ry. Co. v. Woolbridge*, 32 Ill. App. 237; *Keokuk Co. v. True*, 82 Ill. 608; *St. Louis & S. F. Ry. Co. v. Coulson*, 8 Kan. App. 4 (54 Pac. 2); *Alabama G. S. Ry. Co. v. Arnold*, 84 Ala. 159 (4 So. 359, 5 Am. St. Rep. 354); *White v. Railway Co.* 89 Ky. 47 (12 S. W. 936); *Lemery v. Great Northern Ry. Co.* 83 Minn. 47 (85 N. W. 908); 1 Fetter, Carriers, § 234.

3. It is the duty of a railroad company and of two connecting companies jointly using a depot, to keep it safely lighted, as well as in a safe condition, for a reasonable time before and after the arrival and departure of its trains: *Wallace v. Wilmington & D. R. Co.* 8 Houst. 529 (18 Atl. 818); *Bueneman v. Railroad Co.* 32 Minn. 390 (20 N. W. 379); *Louisville, N. A. & C. Ry. Co. v. Lucas*, 119 Ind. 583 (21 N. E. 968, 6 L. R. A. 193).

4. What is a reasonable time in such a case is usually a question of fact for the jury and depends largely upon circumstances which surround the case: 3 Thompson, Negligence (2 ed.), § 2686, and authorities cited.

5. The court could not say as a matter of law that three hours was an unreasonable time for a passenger to remain at a station in the nighttime, when he came into a joint depot on one train and had made arrangements with both companies to go out at the end of that time on the other: *St. Louis S. W. Ry. Co. v. Griffith*, 12 Tex. Civ. App. 631 (35 S. W. 741); *Holcomb v. Railway Co.* 31 Am. & Eng. R. R. Cas. (N. S.) 482.

6. Whether a passenger at such a depot, or at any depot, had used ordinary care in walking carefully across the plat-

form, in the dark on a close, warm night, where he had been riding in a close, uncomfortable car for several hours, for the purpose of getting fresh air and taking exercise is a question for the jury: *Kentucky & I. Bridge Co. v. McKinney*, 9 Ind. App. 213 (36 N. E. 448); *Louisville, N. A. & C. Ry. Co. v. Tredway*, 143 Ind. 689 (40 N. E. 807, 41 N. E. 794); *Alabama G. S. Ry. Co. v. Arnold*, 84 Ala. 159 (4 So. 359); *Chicago, etc., Ry. Co. v. Woolbridge*, 32 Ill. App. 237; *Railway Co. v. Lawrence*, 96 Ill. App. 635; *Keokuk v. True*, 82 Ill. 608; *St. Louis & S. F. Ry. Co. v. Coulson*, 8 Kan. App. 4 (54 Pac. 2); *McCone v. Railway Co.* 51 Mich. 601; *McDonald v. Chicago & N. W. Ry. Co.* 26 Iowa, 124 (95 Am. Dec. 114); *Missouri Pac. Ry. Co. v. Neiswanger*, 41 Kan. 621 (21 Pac. 582, 13 Am. St. Rep. 304); *Union Pac. Ry. Co. v. Evans*, 52 Neb. 50 (71 N. W. 1062); *Bueneman v. Railroad Co.* 32 Minn. 390 (20 N. W. 379); *Weston v. Railroad Co.* 73 N. Y. 595; *Archer v. New York, N. H. & H. R. R. Co.* 106 N. Y. 589 (13 N. E. 318); *Railway Co. v. Brown*, 78 Tex. 397 (14 S. W. 1034); *Barker v. Railway Co.* 41 S. E. 148; 3 Thompson, Negligence (2 ed.), §§ 3058, 3061; *Seymour v. Railroad Co.* 3 Biss. 43.

MR. JUSTICE MOORE delivered the opinion of the court.

It is contended by defendants' counsel that the testimony introduced by plaintiff conclusively shows that the injury of which he complains was caused by his contributory negligence, and hence the court erred in overruling their motions for judgments of nonsuit, based on that ground. The legal principle insisted upon necessitates an examination of the bill of exceptions, which shows that the Oregon Railroad & Navigation Co. is a corporation owning and operating a railroad from Portland east to Huntington, passing through the station of Biggs, situated on the south bank of the Columbia River. The Columbia Southern Railway Co. is also a corporation owning and operating a railroad from Biggs south to Shaniko. The depot and tracks at Biggs are owned by the former company, but the cost of maintaining the station is borne, and the tracks and premises connected therewith are jointly used, by both in receiving and discharging passengers. The station building is placed east and

west between parallel tracks, the Oregon Railroad & Navigation Co. using the lines of rails on the north side of the depot, and the other company those on the south. This building is surrounded by a plank platform 16 feet wide on the north, 12 on the south, and 14 on the east and west. The land on which the depot stands slopes to the south, so that the north edge of the platform is level with the tracks of the Oregon Railroad & Navigation Co., while the south edge is about five feet above the rails on that side, and the center of the west edge about six feet above the surface of the ground, which at that point is somewhat depressed. The Columbia Southern Railway Co., at the time of plaintiff's injury, was operating daily trains only, but the other company was running night passenger trains—No. 6, going east, passing through Biggs at 12:22 midnight, and No. 3, going west, at 3:30 a. m. These trains were not scheduled to stop at that station, which was closed at night, and no light maintained at the depot, the passengers being accommodated by the day trains of both companies which stopped at that junction.

The plaintiff is 59 years old, has traveled extensively by rail, is engaged in buying wool on commission, and had been at Biggs 11 times prior to his injury, passing in the daylight over a gang plank extending from the depot platform to the cars of the Columbia Southern Railway Co. With other buyers, he was at Shaniko June 27, 1903, attending a sale of wool, which was not concluded until evening. As these dealers could save a day's time if they could reach Biggs and take the night passenger trains of the Oregon Railroad & Navigation Co., they employed the other company to carry them by special train to that junction, the train dispatcher of the former company having telegraphed that its night passenger train would stop at Biggs if the special train reached there in time. The train so chartered left Shaniko at 8:40 p. m., and reached the junction at 12:15 that night, the car in which the wool dealers rode being left on the south side of the depot, and near the west end thereof. A few minutes thereafter train No. 6 stopped at the north side of the depot, and the passengers from Shaniko, who were going east, were escorted by a trainman of the Columbia Southern Railway Co., having a lantern, from its car, over the gang

plank and across the west end of the depot platform to the train of the other company. The plaintiff accompanied the departing passengers to their train, and immediately returned with the trainman to the car which he had left, intending to take passage for Portland when train No. 3 arrived. The car in which plaintiff was to wait was well lighted, and provided with a suitable toilet room. He sat down, and tried to slumber, but on the way from Shaniko the passengers had freely indulged in smoking, and he was unable to sleep. Being weary from the effects of his ride and fatigued from the strained position occasioned by sitting for several hours in an ordinary passenger car, he rose, left the coach, and again passed over the gang plank, intending to cross the tracks of the Oregon Railroad & Navigation Co. to seek refreshment in a cool breeze from the Columbia River, and also to urinate. Instead of going directly north, he turned to the west, and slowly walked in the darkness to the edge of the depot platform, which was not protected by a railing, and fell to the ground, sustaining such an injury that one of his legs had to be amputated below the knee. As a witness in his own behalf he testified on cross-examination that he had been at Biggs several times prior to June 28, 1903; that he knew the station platform was level with the car tracks on the north, but elevated on the south, requiring a gang plank, over which he had always passed in entering or leaving the coaches of the Columbia Southern Railway Co., but he had never particularly noticed the ground around the station; that he knew the platform did not extend indefinitely to the west; and, referring to the time when he was injured, he said, "It was the darkest night I ever saw."

In support of the judgment rendered it is asserted by his counsel that, as the defendants jointly maintain the depot at Biggs, each owes a duty to persons arriving on the cars of one company to take passage on those of the other to provide a reasonably safe platform, and to see that it is suitably lighted at night for a reasonable time before the arrival and after the departure of their trains, and for any neglect in these particulars they are jointly and severally liable for any damage resulting therefrom; that the Oregon Railroad & Navigation Co., having agreed to stop its train No. 3 at Biggs, on the night in question,

for the accommodation of persons coming on the special train from Shaniko and intending to go west over its line, thereby established the relation of carrier and passenger with such persons from the time of their arrival at the junction, and, neither company having lighted the depot or platform, plaintiff, who then was a passenger of both companies, and entitled to go on the platform for exercise and to secure pure air, had the right to assume from its dark condition that it was reasonably safe for his accommodation, but, having been dangerous by reason of the defendants' failure to maintain a railing or a light, he is entitled to recover from them the damages awarded by the jury, and hence no error was committed as alleged.

1. It will be remembered that the night passenger trains of the Oregon Railroad & Navigation Co. were not scheduled to stop at Biggs, and for that reason no light was maintained there. The plaintiff's right to recover compensation for the injury sustained depends upon the existence of some duty owed him by the defendants, or either of them, the breach of which was the proximate cause of his hurt: *Emry v. Roanoke Nav. Co.* 111 N. C. 94 (16 S. E. 18, 17 L. R. A. 699). The law imposes on a railway company engaged in carrying persons for hire the duty of exercising reasonable care in keeping its platforms, approaches thereto, and station grounds, so far as passengers would naturally resort to them, properly lighted at night for a reasonable time next prior to the arrival or immediately following the departure of a train which its time cards specify will stop at night to take on or put off passengers: 3 Thompson, Negligence, § 2691; 4 Elliott, Railways, § 1641; Hutchinson, Carriers (2 ed.), § 516; *Louisville, N. A. & C. Ry. Co. v. Lucas*, 119 Ind. 583 (21 N. E. 968, 6 L. R. A. 193); *Ohio & M. Ry. Co. v. Stansberry*, 132 Ind. 533 (32 N. E. 218). What constitutes a reasonable time during which such premises must be kept lighted is determined by the circumstances of each particular case, and depends upon the size and importance of the station and the number of persons who lawfully visit it at night for the purpose of transacting business with the railroad company: 3 Thompson, Negligence, § 2686; *Alabama G. S. Ry. Co. v. Arnold*, 84 Ala. 159 (4 So. 359, 5 Am. St. Rep. 354); *Louisville*,

N. A. & C. Ry. Co. v. Treadway, 143 Ind. 689 (40 N. E. 807, 41 N. E. 794).

2. A person who has completed his journey on a railroad train and alighted therefrom at a station provided for the accommodation of the general public is allowed a reasonable time to leave the premises; and one who lawfully intends to secure passage on the cars is permitted to occupy the waiting room of a depot a reasonable time immediately preceding the arrival of a train which he expects to take, during which such person sustains towards the carrier a relation analogous to that of a passenger, to whom the railway company owes a duty commensurate with the degree of danger to which such person may be exposed: 4 Elliott, Railways, § 1592; 2 Wood, Railways (Minor's ed.), § 310. In *Heinlein v. Boston & Prov. Ry. Co.* 147 Mass. 136 (16 N. E. 698, 9 Am. St. Rep. 676), it was held that a person remaining at a station three or four minutes after he knows that the train which he desired to take had already gone, when there was nothing to detain him except his wish to take a street car which would soon arrive at such station, ceases to have the rights of an intending passenger, and cannot recover for injuries sustained by him in attempting to leave the station by reason of the station door being closed, the station lights extinguished, and the passage by which he endeavored to depart insufficiently illuminated. In *Quantz v. Southern Ry. Co.* (N. C.) 49 S. E. 79, a person having arrived at night on a train at his destination left the station grounds, but, returning in a few minutes to the depot on business of his own, walked into an open doorway, and, falling, was injured, and it was ruled that he had ceased to be a passenger, and was only a licensee, to whom the railroad company did not owe the duty of keeping the door closed, but only of maintaining a way that was free from danger. In *Missouri Pac. Ry. Co. v. Neiswanger*, 41 Kan. 621 (21 Pac. 582, 13 Am. St. Rep. 304), the appellee, a stranger, arrived by rail at Beloit, Kansas, about 5 o'clock p. m., and went immediately into the depot, intending to go to Osborn, in that State, by the next train, which she was informed by the agents of the company would leave at 9:20 that night. Having secured a ticket entitling her to be carried on the appellant's cars to her destination, she left

the depot, but returned "about dusk" on May 6th, and waited to resume her journey. Her train not having arrived at 11 o'clock p. m., she had occasion to go to the toilet, but, there being none in the building, she went upon the depot platform, which was not lighted, and walking off, sustained an injury, and it was held that the railroad company was liable therefor.

3. In *St. Louis S. W. Ry. Co. v. Griffith*, 12 Tex. Civ. App. 631 (35 S. W. 741), the appellee, having secured a coupon ticket for the entire distance, left Gainesville, Texas, with her babe, for Mt. Vernon, in that State, going via Greenville, where she was to change cars. At the latter city she was transferred to the appellant's depot, which she reached at 2 o'clock p. m., and, being a stranger without money, and informed that no hotel or boarding house was within a mile of the station, she concluded to remain in the waiting room until 12 o'clock that night, when the next passenger train for Mt. Vernon would arrive. The station agent, knowing her intention, either consented, or at least made no objection, to her occupying the room until she could resume her journey. About 9:30 o'clock p. m. the appellant's night agent in charge of the depot entered the waiting room, turned down the light, placed his arm around the appellee, and, over her protest, tried to kiss her, and also made improper proposals to her. She pleaded with him to desist, and not molest her, whereupon he returned to his office, and she quietly left the depot with her babe, and went to a private residence, and notified the occupant of the attempted outrage. Mrs. Griffith commenced an action against the railroad company to recover damages for the assault, and, having secured a judgment, it was affirmed on appeal; the court holding that as she possessed a ticket, and had gone to the depot for the purpose of taking passage on the first train that arrived, and, by the assent of the station agent, was permitted to occupy the waiting room, she sustained the relation of a passenger, to whom the company owed a duty to protect, and it was therefore liable in damages for the assault of its agent. In *Missouri Pac. Ry. Co. v. Neiswanger*, 41 Kan. 621 (13 Am. St. Rep. 304, 21 Pac. 582), the question of reasonable time before the arrival of a train when a person at a depot intending to take a train may be regarded in

the nature of a passenger was not involved, for, the train having been scheduled to reach the station at 9:30 p. m., and thereafter momentarily expected to arrive, when Mrs. Neiswanger was injured, shows that she was certainly entitled to protection. So, too, in *St. Louis S. W. Ry. Co. v. Griffith*, 12 Tex. Civ. App. 631 (35 S. W. 741), the question of reasonable time was not in issue, for Mrs. Griffith's occupancy of the waiting room at the depot was not in pursuance of an absolute right, but resulted from the station agent's knowledge that she intended to remain at the depot 10 hours, waiting the arrival of her train, and his assent thereto. In the case at bar the testimony shows that the agents of the Columbia Southern Railway Co. who operated the special train were informed that plaintiff intended to take passage for Portland on train No. 3 of the other company when it reached Biggs, and, knowing this, they assented to his occupying the car in which he had made the journey from Shaniko until the arrival of the other train. The Columbia Southern Railway Co., by reason of this assent of its agents, thereby treated plaintiff in the nature of a passenger, notwithstanding it had safely carried him the entire distance agreed upon.

4. The train dispatcher of the Oregon Railroad & Navigation Co. had agreed to stop train No. 3 at Biggs if the special train reached that station in time, and he must have known that some passenger would be at the depot intending to go west. This knowledge, however, in the absence of any stipulation to that effect, did not bind the last-named company to light its depot platform until a reasonable time next prior to the arrival of its west-bound passenger train.

5. The plaintiff, having accompanied the wool buyers going east to their train, returned to the car provided for his accommodation about three hours before train No. 3 was expected to arrive. Whether or not such period of time next prior to the arrival of a train is reasonable during which the Oregon Railroad & Navigation Co. should have kept its depot platform lighted at a station where its night passenger trains were not scheduled to stop, is not now necessary to inquire, for that was a question exclusively for the jury to determine.

6. In considering the action of the trial court in overruling the motions for judgments of nonsuit interposed on the ground of plaintiff's alleged contributory negligence, we shall for the present treat the question as it relates to the duty of the Columbia Southern Railway Co. only, basing our conclusion on its assent to plaintiff's occupying its car until the arrival of the west-bound passenger train on the road of the other company. This car was pro hac vice a depot to all intents and purposes, well lighted, and provided with a suitable toilet room, so that it was unnecessary for plaintiff to leave it, as in the cases of *Missouri Pac. Ry. Co. v. Neiswanger*, 41 Kan. 621 (13 Am. St. Rep. 304, 21 Pac. 582), and *Louisville, N. A. & C. Ry. Co. v. Treadway*, 143 Ind. 689 (40 N. E. 807, 41 N. E. 794), to obey an urgent call of nature. The testimony shows that the coach provided for plaintiff's accommodation was scented with tobacco smoke, but it nowhere appears in the bill of exceptions that the fumes of that weed were offensive to him, as in the case of *McDonald v. Chicago & N. W. Ry. Co.* 26 Iowa, 124 (95 Am. Dec. 114), in which Mr. Chief Justice DILLON said: "If the station room is full, or if it is intolerably offensive by reason of tobacco smoke, so that a passenger has good reason for not remaining there, while this will not justify him in violating reasonable rules and regulations of the company, which are known to him, respecting the place, mode, and time of entering the cars, it will justify his endeavor to enter the cars at as early a period as possible, especially if it is dark and cold without, if in so doing he uses proper care, and violates no rule or regulation of the company of which he has actual knowledge, or which, as a reasonable man, he would be bound to presume existed." At the time plaintiff sustained the injury he did not go upon the station platform for the purpose of entering a car in which he expected to take passage, or to transact any business with either railroad company, nor was he for any reason necessarily compelled to leave the coach which he occupied. His act in leaving the car at the time and under the circumstances indicated, and going to the platform, which he knew was not lighted, is sought to be justified on the ground that he was entitled to walk for exercise, and to secure fresh air, and that he had a right to assume, from the extreme darkness,

and his knowledge that the defendant companies were aware that he was waiting the arrival of a train at a depot jointly used by them, that they had discharged the obligation devolving upon them of making the station platform reasonably safe, and that, relying thereon, he was injured in consequence of their breach of duty, thereby rendering them liable for the damages resulting from the injury which he sustained. He could undoubtedly have secured an abundant supply of fresh air by raising a window of the coach, thereby ventilating it, and hence he was not obliged to leave the car for that purpose.

This brings us to a consideration of the remaining question—whether or not a person sustaining the quasi relation of a passenger can, for the mere purpose of exercise, leave a well-lighted depot, provided with necessary accommodations, and go in the darkness upon a walk surrounding the station, and recover damages for an injury sustained in consequence of the carrier's failure to maintain a railing on or its omission to light the platform. A passenger, before reaching his destination, may leave a car or a boat to transact his own private business at any intermediate station or landing where a stop is made for any reasonable time to receive or discharge passengers; and if, without his fault, he is injured in consequence of the carrier's negligence on any part of the premises set apart by it for the use of the public, or used with its consent, he may recover the damages sustained: 1 Fetter, Carriers, § 234. Thus, in *Dice v. Willamette Transp. Co.* 8 Or. 60 (34 Am. Rep. 575, 6 Am. Neg. Cas. 202), the plaintiff, a passenger, before reaching his destination, attempted to leave the defendant's steamboat to transact his own business at a landing where passengers and freight were being discharged, and, the night being dark and rainy, and the lights on the boat and on the wharf insufficient to enable him plainly to see his way, he fell, sustaining an injury, and it was held that he had a right of action against the carrier for its negligence in not providing a safe means of egress from the boat to the wharf.

In *Hrebik v. Carr* (D. C.), 29 Fed. 298, notice having been given that a steamer would sail early on a certain morning, the plaintiff and her husband went on board the boat the evening before her departure, and soon thereafter he, in attempting to

cross to the wharf to secure some tobacco, fell from the gang plank and was drowned. In an action to recover for the death it was held that a passenger on board a vessel before she left port had the right to go ashore for the purpose stated, and that it was the duty of the carrier to provide a safe means of passage from the steamer to the pier. In that case, it does not appear that the night had set in, or, if so, that the passageway was not lighted. In deciding the case *BENEDICT, J.*, says: "The necessity on the part of a passenger, who has taken his position as a passenger, to return to the pier, is a common incident to travel. It is constantly done to find lost baggage, to speak to a friend, and may be done to purchase tobacco by any one addicted to the use of that weed. From this necessity arises the obligation on the part of the ship to keep and maintain for the passenger's use, at all proper times, a safe passageway from the steamer to the pier."

In *Alabama G. S. Ry. Co. v. Coggins*, 88 Fed. 455 (32 C. C. A. 1), the appellee, a lineman in the employ of the Western Union Telegraph Co., was traveling in the caboose of a freight train to a point where repairs were to be made. The train on which he was riding stopped at Rising Fawn, Georgia, an intermediate station, at the usual place for the alighting of passengers from freight trains, which was about 1,500 feet from the station proper. The appellee got off the car and started to walk to the station by the only practicable way, which was between the main track and the house track, to see if there was any telegram for him from his employer. As he was going to the station he saw a part of the train on which he came backing towards him on the main line, and as it approached he concluded it would be safer to cross over near the house track, and in doing so he was struck and injured by a switching car on a cut-off. In an action to recover damages for the hurt inflicted the railroad company introduced testimony tending to show that the appellee was loitering along between the tracks, talking with acquaintances whom he met; that he had no reason to anticipate the receipt of a telegraphic order at that point; and that he was standing on or near the track, looking up at the telegraph wires, when struck. The

trial court, having instructed the jury in relation to the degree of care due from a railroad company to a passenger on a freight train, said:

"Now, when they reached Rising Fawn, that not being the plaintiff's place of destination, if he alighted from the car intending to go direct to the depot for a particular business purpose, and with the intention of returning when that purpose was accomplished, he would, while going to and from the depot, exercising the proper diligence due from a passenger, remain a passenger and would be entitled to the degree of care belonging to a passenger. Now, that rule applies until he had time to get off the car, going along exercising reasonable prudence to do so, attend to his business (if any he had), and return, and no longer. The liability of the company to him as a passenger lasted only so long as to give him a reasonable time in which to get to the depot and return after transacting his business, and did not extend to him after the lapse of that time. After that they owed him no duty, except that which they owed to any stranger—not to wantonly or unnecessarily injure him. * *

"Now, on the contrary, if, after they had got in the yard, he got out of the train, without having any business that required him to go to the depot that not being his point of destination, or without having any particular business to go to the depot, and instead of going by the direct and usual route and within a reasonable time, such as any other man (a prudent man) would have required to go to the depot, and if, instead of that, he, out of mere curiosity, got out to look through the yard and talk with the employees in the yard—if he stopped in the yard and began to talk and loiter about the yards there in conversation, or if he began to look at the overhead wires, as one of the witnesses indicates probably he did (at least, there is a silent proof that tends to show that)—why, then, in each of these contingencies, he would cease to be a passenger, but would be there on the switchyard at his peril; and the only duty the defendant company would owe to him in such a situation as that would be the duty not to wantonly or unnecessarily injure him, and they would owe him no greater duty than they would owe a stranger in the yard without any business."

A judgment having been rendered against the railroad company, was affirmed on appeal; TAFT, J., in referring to the instructions, saying: "The foregoing states the law correctly, and leaves to the jury the issue in such a way as to enable them, without difficulty, justly to determine whether Coggins was entitled to the high degree of care from the railroad company due a passenger when he was struck." Further in the opinion it is said: "The authorities are not quite so uniform upon the question whether the obligation of the carrier extends to the same degree of care over the safety of its passengers when they alight at intermediate stations and go to the station house while the train is waiting. But we think the weight of authority, reason and custom all require us to hold that where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshment, of the sending or receipt of telegrams, or of exercise by walking up and down the platform, or the like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety." In that case nothing is said as to what time the appellee was injured, but, as it is intimated that he was looking up at the telegraph wires when he was struck, it is to be inferred that it was daylight. This being so, what is said in the opinion about the right of a passenger to walk up and down the depot platform for exercise can have no application to explorations made at such a place in utter darkness.

In *St. Louis & S. F. Ry. Co. v. Coulson*, 8 Kan. App. 4 (54 Pac. 2). W. F. Coulson was a passenger on appellant's train, which stopped at an intermediate station for dinner. He left the car in which he was riding, and went to an eating house, where he secured his lunch, and, having returned, he passed through a car to the depot platform, where, having been informed by the conductor that the train would start in three or four minutes, he walked to the platform on the opposite side, and stood five or six feet from the end of a coach. He then started towards the car, whereupon he caught his foot in a warped plank, and, falling, put out his hand for protection, and

as he did so the train simultaneously started, whereby he was injured. A judgment having been rendered against the railroad company for the damages sustained, it was contended by the appellant that its obligation under the contract ceased when Coulson got his lunch and returned to the car. The court, discussing this question, say: "We cannot consent to this doctrine. The train had stopped for dinner. The passengers were invited to this platform. It was maintained for their safety and convenience, and they were expected to get on and off. This was involved in and connected with the regular passenger service of the road. The act of Coulson in leaving the train at this particular point, after he had returned from his luncheon, is not sufficient to justify this court in declaring as a matter of law that he was negligent, or that the obligation of the company to provide safe passage for him had been fulfilled, or that the relationship as a passenger to the company had for the time ceased." In that case the injury occurred at the noon hour, when the passenger was undoubtedly afforded sufficient natural light plainly to see the passageway that had been provided by the railway company for the accommodation of the traveling public.

In *Chicago, etc., Ry. Co. v. Woolridge*, 32 Ill. App, 237, the appellee having a railroad ticket, was walking on a depot platform about 9 o'clock p. m., waiting the departure of his train, which stood on a side track, and was expected to pull out after a "rally" meeting adjourned. Another train coming in rapidly hit a baggage truck which was being pulled on the platform, causing it to strike and injure him. In an action to recover the damages resulting from the hurt the court refused to instruct the jury that unless the appellee was at the place where he was injured on business with the railroad company, or was there to take a train about to depart from the station, or to meet some one expected to arrive on the train which struck the baggage truck, or to see some one about to leave, then, if there was a suitable waiting room, though he was expecting to depart on some other train for which he might have been waiting, he had no right to be on the depot platform at the time he was injured. A judgment having been rendered against the company, was affirmed on appeal; the court, in referring to the charge

requested, saying: "We do not think this states the law correctly. To hold that a passenger waiting at a railroad depot for his train to arrive must remain in the waiting room, and that if he goes out upon the platform at any time before it becomes necessary to board his train he is guilty of such negligence as to prevent his recovery for an injury like the one in question, is not consistent with reason or common sense." In that case the baggage master testified that he lighted the gas at the baggage room door before the arrival of the train causing the injury. The depot platform must also have been lighted, for Woolridge testified that he saw the baggage truck when it was struck by the incoming train.

In *Lemery v. Great Northern Ry. Co.* 83 Minn. 47 (85 N. W. 908), the plaintiff, having purchased a railroad ticket, entered a day coach at Duluth, Minnesota, for a continuous passage to Park River, North Dakota, on defendant's through train that did not stop at intermediate stations to receive or discharge passengers. After the train started, plaintiff left the car originally taken, passed to the rear into a sleeping car, going through a coach occupied by a military company that maintained guards at each entrance of the car, but passengers were not prevented from passing through it when necessary. As the conductor entered the sleeper, plaintiff discovered that he had lost his ticket, and, being compelled to pay his fare, he demanded a receipt therefor, but none was given him, the conductor claiming that his blank acknowledgements of payment were at the other end of the train. The plaintiff remained in the sleeper until the train arrived at Grand Rapids, Minnesota, where it was stopped at night, when it was very dark, for the purpose only of taking water. When the train came to a halt, plaintiff left the sleeper, as he insisted, to find the conductor and again to demand a receipt, and also to pass around the car occupied by the militia and enter the day coach, claiming that he was not permitted longer to remain in the sleeper, and that the military guards would not allow him to pass through the car which was under their care and protection. In alighting at the station plaintiff fell between the steps of the sleeper and the depot platform, which was not lighted, sustaining an injury. An action having been begun to recover the damages

resulting from the hurt sustained, a judgment of nonsuit was rendered, which was affirmed on appeal, the court finding that the reasons assigned by plaintiff for going to the station platform were subterfuges, and holding that a through passenger on a train which did not stop at intermediate stations, who leaves such train without the knowledge, consent or invitation of the company at any intermediate station at which the train may stop for some purpose necessary to its operation and management only, abandons for the time being his relation as a passenger, and assumes all the risks incident to his movements. In rendering that decision Mr. Justice BROWN, speaking for the court, says: "In the case of a local train the company is bound to know that passengers may be received and discharged at all stations at which a train may stop for that purpose, and is required by the rule to keep the approaches to the train in a safe condition for their egress and ingress." Further in the opinion it is said: "This was not a local train, but a through train, and the plaintiff was a through passenger. The train did not stop at Grand Rapids to receive or discharge passengers. There was no invitation held out to plaintiff to leave the train at that station. There was no occasion for him to do so, and he must be taken to have assumed all risks incident thereto. There was not only no invitation, express or implied, to passengers to leave the train at this station, but the fact that the station platform was unlighted was in the nature of a warning to them to remain on board."

7. The cases to which attention has been called, illustrating the right of a passenger, without forfeiting his relation as such, to leave a car or a boat at an intermediate station or landing to transact business of his own, or for his own pleasure, where a stop is made to receive or discharge passengers, are relied upon by plaintiff's counsel to justify their client in assuming from the unlighted platform that it was safe for him to walk thereon. An examination of these cases will show that *Dice v. Willamette Transp. Co.* 8 Or. 60 (34 Am. Rep. 575, 6 Am. Neg. Cas. 202), is the only one cited in which judgment is given for injuries received in the darkness by a passenger at an intermediate station or landing by leaving a car or a boat to transact business not

connected with the carrier, and in that case it will be remembered that the steamboat and the wharf were lighted, but not sufficiently to enable the plaintiff to discover and avoid the danger to which he was exposed. In that case, the boat having made a landing at night where passengers and freight were being discharged, Dice might reasonably have inferred from the light on the wharf and on the steamer, which he must have seen, that the passageway was sufficiently illuminated to enable him safely to go ashore. In the case at bar, if the plaintiff had necessarily been compelled to leave the car because the Columbia Southern Railway Co. neglected to furnish suitable accommodations, or if the train of the other company, upon which he expected to take passage, was approaching Biggs Station, so that to board it he was obliged to cross the depot platform in the darkness, a very different rule of law would be applicable. The right of a passenger, before reaching his destination, to leave a car and to walk on a depot platform for exercise, when the train is stopped in daylight, to receive or discharge passengers, or at night, even, when the walk is sufficiently illuminated, is admitted. The vibration of a car in rapid motion prevents a passenger from materially changing his position in a seat, the occupation of which for several hours necessarily produces extreme tension of the muscles of the lower limbs, to relax which relief is found in walking, and, as this cannot readily be secured in a car, it must be obtained, if at all, outside the coach, and when it is at rest. When a train is stopped in daylight for any reasonable length of time to receive or discharge passengers an invitation is thereby tacitly extended by the railroad company to the passengers in the coaches to alight for a few minutes' rest and invigoration by a change of position and a respiration of pure air. The same invitation, it would seem, must also be offered at night where a train is stopped for a reasonable time to receive or discharge passengers at a station, the platform of which is well lighted. A passenger on a train, before reaching his destination, cannot, in reason, be invited to leave the car every time a stop is made at night to receive or discharge passengers. If a contrary rule were to obtain, it would necessarily follow that a railroad company would not venture to stop a train when flagged at night at an insig-

nificant station, the platform of which was not illuminated, however urgent might be the call to board the train.

When the platform of a depot at which a train stops at night is not illuminated, the darkness is a notice to passengers in the cars who are not obliged to depart at that station to remain in the coaches: *Lemery v. Great Northern Ry. Co.* 83 Minn. 47 (85 N. W. 908). So, too, where a person, intending to take a train, goes at night to a well-lighted waiting room of a depot, and, leaving it, walks to an unlighted freight platform, and there sustains an injury, his contributory negligence precludes a recovery: *Gunderman v. Missouri, etc., Ry. Co.* 58 Mo. App. 370. In that case the plaintiff, knowing the construction of the depot, went to a platform not intended to be used by passengers. It is cited, however, to show that an unlighted way imparts notice to all persons except such as are necessarily compelled to pass over it. In deciding that case the court, referring to the plaintiff, say: "He wantonly left the comfortable waiting room and well-lighted passenger platform of defendant, and sauntered forth into the darkness, and upon the defendant's freight platform, and without there giving heed to the existing conditions, patent to his senses, and which were sufficient to have warned an ordinarily prudent man of the probable danger of proceeding further, he persisted in going forward until he fell into the pit. He was guilty of such contributory negligence as must preclude his recovery." To the same effect, see *Grimes v. Pennsylvania Co.* (C. C.), 36 Fed. 72.

In the case at bar plaintiff had crossed the depot platform several times in daylight before he was injured and, though he testified that his attention was never called to the condition of the ground at the west end of the platform, he knew the south side of the walk surrounding the building was elevated while the north side was level with the track of the Oregon Railroad & Navigation Co. Knowing these facts, reason must have taught him that the surface of the ground at the west end of the platform descended to the south, unless it had been graded up to that line.

If it was incumbent upon either of the defendants to light the depot platform three hours before a train was expected to arrive,

the failure in this respect was known to the plaintiff, who, when he was injured, was not necessarily compelled to leave the well-lighted car that had been provided for his accommodation; but, having done so, on one of the darkest nights he ever saw, his injury results from his own contributory negligence, thereby precluding a recovery of damages for the hurt sustained: *Massey v. Seller*, 45 Or. 267 (77 Pac. 397); *Missouri, K. & T. Ry. Co. v. Turley*, 85 Fed. 369 (29 C. C. A. 196); *Emery v. Chicago, M. & St. P. Ry. Co.* 77 Minn. 465 (80 N. W. 627).

There being no conflict in the testimony, an error was committed in refusing to give a judgment of nonsuit in favor of each defendant. The judgment is therefore reversed, and the cause remanded, with directions to sustain the motions interposed.

REVERSED.

Decided 3 July, 1905.

RICE v. WALLOWA COUNTY.

81 Pac. 358.

INJURY TO TRAVELER OVER COUNTY BRIDGE—COMPLAINT—ALLEGING KNOWLEDGE OF DEFECTS BY COUNTY OFFICERS.

1. Allegations in a complaint that a stated county, through its agents and officers, allowed the stringers of a certain bridge to become rotten and unsafe by leaving them in the structure many years, that such defective and dangerous condition was well known to defendant county, and that a short time before the accident the county refloored the bridge, using the rotten stringers instead of replacing them with sound ones, are sufficient after verdict, both because it is thereby stated that defendant actually knew of the real condition of the bridge, and because it is fairly inferable from the facts stated that the defendant knew, or by the exercise of proper diligence could have known, of such condition.

INJURY TO TRAVELER OVER COUNTY BRIDGE—SUFFICIENCY OF EVIDENCE.

2. The evidence of the negligence of the county officials in reference to the condition of the bridge in question was ample to go to the jury and to justify a verdict for plaintiff.

PERSONAL INJURIES—SCOPE OF COMPLAINT—INTERNAL INJURIES.

3. Under a complaint showing that through the negligence of defendant plaintiff was thrown, thereby "producing serious and lasting internal injury to" her, it is competent to show that in consequence of being so thrown plaintiff has since suffered with heart trouble and neuralgia, for both may be classed as internal injuries, and it is possible that each may have been superinduced by the fall: *Maynard v. Oregon Railroad Co.*, 43 Or. 63, distinguished.

EXPERT WITNESS—QUALIFICATION.

4. A witness testifying that his business was farming, that he had set posts and built fences of different kinds, that he was acquainted with the probable age and soundness of the material used in defendant's bridge, that he had cut timber in the vicinity for twenty years, had had experience with timber buried in the ground in the form of bridge abutments, had done a good deal of such work and had watched it closely, and that he was not an expert, but knew how long that kind of timber would last, was qualified as an expert touching the length of time timbers of the kind would remain sound in the ground or where in contact therewith.

QUALIFYING EXPERT BY CROSS-EXAMINATION.

5. An error in holding a witness qualified as an expert, on examination in chief, is cured, where, on cross-examination, his qualification is shown.

SUBJECT OF EXPERT TESTIMONY—LASTING QUALITY OF TIMBERS.

6. Expert testimony is competent to show how long certain kinds of timber will remain sound under stated conditions, as, when partly covered with earth, that not being a matter of common observation or knowledge.

DEFECTIVE BRIDGE—RESULTING INJURY—PLEADING AND PROOF.

7. Though a complaint alleged that an injury to plaintiff resulted from the defective condition of bridge stringers, and made no mention of the condition of the planking, evidence as to the unsound condition of the planking when the bridge was redecked, prior to the accident, was evidentiary matter tending to show with what lack of care defendant maintained the bridge, and, being closely connected with the discovery by defendant's workmen, at the time, of the unsound stringers, could be considered on the question whether defendant had or should have had knowledge of the present condition of the bridge.

From Union: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This is an action by Settie E. Rice against Wallowa County, for the recovery of damages for personal injuries received by plaintiff while in the act of crossing a bridge upon the public highway which broke down, precipitating her into the bed of the stream below, thereby, as the complaint sets out, "crushing and bruising the plaintiff and breaking her breastbone and rib, and otherwise producing serious and lasting internal injury to her." The complaint further alleges:

"That the said dangerous and defective condition of the said county and public bridge was well known to the defendant county, and was due to the said county's gross carelessness and negligence, and said county had, through its agents and officials having supervision thereof, allowed the stringers of said bridge to become rotten and unsound by reason of having been in said bridge many years, which defective condition was known to the defendant, which had by its agents refloored the said bridge during the year and summer of 1902, and used the said rotten stringers again, wilfully neglecting to replace them with sound stringers, and this rotten condition of the said stringers and neglect on the part of the county was the direct cause of the said accident."

A trial was had before a jury, resulting in a verdict of \$1,650. At the close of plaintiff's testimony, defendant moved for a judgment of nonsuit, which motion being denied, the trial was concluded, resulting in a judgment for plaintiff, from which defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Clarence Harrison Crawford*, District Attorney, and *Daniel Webster Sheahan*, with oral arguments by *Mr. Sheahan* and *Mr. Thomas Harrison Crawford*.

For respondent there was a brief and an oral argument by *Mr. James Davis Slater*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The question most earnestly insisted upon arises upon the motion for a nonsuit, and this involves two subsidiary questions: (1) Whether the complaint is sufficient, it being here challenged for the first time; and (2) whether there is evidence sufficient to go to the jury as it respects defendant's knowledge of the alleged defect, or of such state of facts from which defendant might and should have known of such defect if it had exercised reasonable diligence in the premises.

1. It can scarcely be doubted that the complaint is good after verdict. The rule, as stated in *Heilner v. Union County*, 7 Or. 83 (33 Am. Rep. 703), is that it must be alleged and proven that the county or its officers had knowledge of the defective or unsafe condition of the bridge, or such a state of facts must be set out from which they might with reasonable diligence have known the condition, and that they neglected and failed to repair within a reasonable time, following *Mack v. City of Salem*, 6 Or. 275. Transposing the language of the complaint for perspicuity, it sets out that the county, through its agents and officers, allowed the stringers of the bridge to become rotten and unsafe by reason of their having been in the bridge many years, and that said defective and dangerous condition was well known to the defendant county. This is an explicit statement of knowledge of the defect, if nothing else, and the complaint is therefore amply sufficient.

But it is insisted that the proofs fail to show actual knowledge, and that it was incompetent to show facts from which knowledge might be inferred, because no such state of facts is alleged as to admit of the latter species of proof. Recurring to the complaint again, after setting forth the matter about the stringers, it further states that such condition was known to the

defendant, and that defendant, by its agents, refloored the bridge during the summer of 1902, and used said rotten stringers again, neglecting to replace them with sound ones. Now, conceding that these alleged facts are true, there is quite sufficient, after verdict, from which it might be reasonably inferred that defendant had notice or ought to have been apprised of the condition if it had exercised the proper diligence in the ascertainment of the fact. True, the complaint might have been drafted with greater accuracy, but it contains at least a defective statement of a good cause of action, upon the theory that a state of facts is shown by which the defendant might have known of the true condition of the bridge by proper diligence.

2. The defendant goes further, however, and insists that the evidence is insufficient, even under this theory, to carry the case to the jury. As to this there is evidence tending to show that three out of four of the stringers in the bridge broke square off at the point of contact with the earth upon which they rested; that they were perfectly rotten where they broke; that they consisted of tamarack poles which had been in use for from 12 to 14 years, and gave way at the smaller end; that a road supervisor in 1900, the accident having occurred in August, 1903, made a repair by putting a plank in on the east end; that he then noticed that the stringers, or at least one, was rotten, and settled down into the earth; that where it rested on the earth it was considerably decayed, and that he did not have the means of fixing the bridge as it should have been; that a new decking was put on in 1902, and that it was then discovered by one of the workmen that one of the stringers was rotten, but that this fact was not disclosed to the supervisor who was in charge; and it was further shown that the ordinary life of a tamarack stick used in the manner of those stringers in that locality is something like seven or eight years. With this before the jury, they could very properly draw the inference that the defendant should have, by proper diligence, known of the unsafe condition of this bridge, and the nonsuit was properly denied. In support of these several conclusions see *City of Guthrie v. Finch*, 13 Okl. 496 (75 Pac. 288), and *City of La Salle v. Porterfield*, 138 Ill. 114 (27 N. E. 937).

3. The plaintiff, while a witness in her own behalf, was asked to state to the jury what were her symptoms as a result of the accident, to which she answered: "Well, I am bothered a great deal with my heart, shortness of breath, and I suffer a great deal with my breast." Objection was made to the question and answer without avail, and the action of the court in that regard is assigned as error. Dr. J. H. Thompson was also called, and testified that he attended the plaintiff for her injuries, and that afterwards, about a month or six weeks before the trial, he made an examination of her, and that she was bothered considerably with neuralgia of the chest as a result of the injury. Exceptions were also saved to this testimony. The objection insisted upon is that the complaint nowhere alleges that the injuries received resulted in heart trouble or neuralgia, and that those infirmities were not a natural or necessary result from the injuries alleged, and therefore that the evidence was irrelevant and inadmissible. The complaint, it will be seen by a reference thereto, is quite comprehensive as it respects the injuries received as a result of the accident, "otherwise producing," as it reads, "serious and lasting internal injury to her." Now, the examination as to each of these witnesses proceeded with a view to ascertaining the plaintiff's suffering or inconvenience as a result of the accident, and the answers were responsive. Either the heart trouble or the neuralgia might have been superinduced by the fall. They may be regarded as internal injuries, and come within the scope of the complaint: *Kircher v. Larchwood*, 120 Iowa, 578 (95 N. W. 184). The case of *Maynard v. Oregon R. Co.* 43 Or. 63 (72 Pac. 590), relates to an attempt to prove a result that could in no way follow from the injuries alleged, and is not to the purpose here.

4. Fred G. Otto was permitted to testify, on the part of the plaintiff, as to the length of time tamarack bridge stringers of the kind found in the bridge would remain sound and durable, he indicating that they would remain in that condition for a period of about seven or eight years. It was objected first that the witness did not qualify himself as an expert. He stated on his examination in chief that his business was farming, that he had set posts and built fences of different kinds, that he was

acquainted with the probable age and soundness of the material used, and, on cross-examination, that he had cut timber up there for 20 years, that he had had experience with timber buried in the ground in the form of bridge abutments, that he had done a good deal of that kind of work, and had watched it closely, and that he was not an expert, but knew how long that kind of timber would last. This development on the examination unquestionably qualified the witness as an expert touching the length of time timbers of the kind will remain sound in the ground, or where in contact therewith: *Washington Turnpike Co. v. Case*, 80 Md. 36 (30 Atl. 571); *Ferguson v. Davis County*, 57 Iowa, 601 (10 N. W. 906); *Buffum v. Harris*, 5 R. I. 243, 250. He had peculiar advantages for informing himself upon the subject, and presumed to know from his own experience, so that he was competent to testify in the capacity of an expert.

5. Whatever may be said of the witness's qualification to thus testify as developed on his examination in chief, the error, if any, committed in passing upon that question was amply cured on the cross-examination. The question was a preliminary one, but, if it should subsequently appear that the witness was qualified to speak as an expert, there could be no complaint.

6. Another objection is urged in this relation, which is by nature inconsistent with the position just discussed, namely, that the matter about which he was called upon to give his opinion lies within the range of the common observation and experience of all men, and that the facts should have been given to the jury, and they left to draw their own conclusion. We are unable to give our assent to this view. Manifestly, only such persons as have by observation and experience gained an adequate knowledge of the durability and length of time tamarack timbers will remain sound where coming into contact with the ground are competent to speak intelligibly upon the subject. People generally know but little about it, and must gain the knowledge from experience, or from the testimony of others who may have had the opportunity for informing themselves. All of which goes to show that the matter is for an expert. There was therefore no error in the ruling.

7. Otto was also permitted to testify touching the unsound and rotten condition of the planking when the bridge was redecked, and this is assigned as error, because the complaint makes no mention of the condition of these planks. This, however, was evidentiary matter, tending to show with what want of care the county authorities maintained this bridge in repair, and, being closely connected with the discovery of the rotten stringers by the workmen, it was pertinent to go to the jury for their consideration upon the question whether the defendant had notice, or ought to have had notice or knowledge, of the present defective condition of the bridge: *Shaw v. Sun Prairie*, 74 Wis. 105 (42 N. W. 271); *Kircher v. Larchwood*, 120 Iowa, 578 (95 N. W. 184).

Exceptions were also saved to certain instructions given by the court, in one instance modifying an instruction requested by the defendant. But as the grounds upon which the exceptions were predicated are the same in substance as those which it is claimed are fatal to the complaint and to plaintiff's case as against the motion for a nonsuit, it is unnecessary to notice them specifically, as what has been said adequately disposes of the questions presented with reference thereto. In further support of the views herein entertained, see *Bonebrake v. Board of Comrs.* 141 Ind. 62 (40 N. E. 141); *Rapho v. Moore*, 68 Pa. 404 (8 Am. Rep. 202).

Finding no error in the record the judgment of the circuit court will be affirmed.

AFFIRMED.

Argued 27 June, decided 3 July, 1905.

CALBREATH v. DUNBAR.

81 Pac. 366.

STATUTES—IMPLIED REPEAL—PAYMENT OF STATE EMPLOYEES.

Laws 1905, p. 192, c. 99, providing for the monthly payment of salaries of certain employees and officers of the State by warrants drawn by the Secretary of State on the State Treasurer for the aggregate amount allowed in favor of the superintendent, president, or other officer of the institution, who is required to give bond to the State to pay over the proceeds of such warrant immediately to the persons entitled thereto, and repealing laws in conflict therewith, was an independent act, and did not repeal or affect B. & C. Comp. § 2398, declaring that no warrant shall be drawn by the Secretary of State in payment of any claim against it unless an appropriation has first been made therefor.

From Marion: WILLIAM GALLOWAY, Judge.

Mandamus by J. F. Calbreath, as Superintendent of the Oregon State Insane Asylum, against F. I. Dunbar, as Secretary of State. From a judgment denying the writ, relator appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. John A. Carson* and *Mr. A. M. Cannon*.

For respondent there was a brief over the name of *A. M. Crawford*, Attorney General, with an oral argument by *Mr. Isaac Homer Van Winkle*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is a mandamus proceeding instituted by the superintendent of the asylum to compel the Secretary of State to issue a warrant in his favor for the salaries of the officers and employees of that institution for the month of May, 1905. The defense of the Secretary is that there is no appropriation available for the payment of such a warrant. Section 2398, B. & C. Comp., reads: "No warrant shall be drawn by the Secretary of State in payment of any claim against the State unless an appropriation has first been made for the payment thereof; but, where such claim has been incurred in pursuance of authority of law, but no appropriation has been made for its payment, or, if made, has been exhausted, the Secretary shall audit such claim, and, if allowed, shall issue to the claimant a certificate as evidence of such allowance." Under this section it is manifest that the Secretary is not only without authority to issue the warrant demanded by the plaintiff, but would violate his official duty if he did so. As said in *Boyd v. Dunbar*, 44 Or. 380 (75 Pac. 695), his duties are "confined to examining and determining the claims of persons against the State 'in cases where provisions for the payment thereof shall have been made by law'; and he has no authority or power to draw a warrant in favor of any claimant, unless there is at the time an unexhausted appropriation for its payment. Such are the mandatory provisions of the statute; the latter having been enacted for the express purpose of changing the policy previously prevailing, which was approved in *Shattuck v. Kincaid*, 31 Or. 379, 393 (49 Pac. 758)."

It is argued, however, on behalf of the plaintiff, that the act of 1905 (Laws 1905, p. 192, c. 99), providing for the payment monthly of the salaries of certain employees and officers of the State, repeals in part, by implication, Section 2398. It is entitled "An act to provide for the payment of the salaries or compensation, monthly, of the officers and employees of the State University, the State Normal Schools, the Oregon School for Deaf-Mutes, the Oregon Institute for the Blind, the Oregon State Insane Asylum, the Oregon Soldiers' Home, the Oregon State Penitentiary, the Oregon State Reform School, employees at the Capitol Building, and those employees in the operation and maintenance of the State Fish Hatcheries." Section 1 thereof provides that the payment of the salaries of the officers and employees of the institutions and boards named, where such salaries or compensation is payable out of the state treasury and is fixed at a definite rate per day, week, month or year, shall hereafter be made monthly as therein provided. Section 2 requires the superintendent or president of the board or institution named, or such other officer as may be designated, to make out and transmit to the Secretary of State at the end of each month a pay roll, duly certified by him and approved by the proper auditing committee or officer, showing the names of the several employees and the amount due each. If the Secretary approves such roll, he "shall draw a warrant on the State Treasurer for the aggregate amount allowed by him thereon in favor of the superintendent, president or other officer of such institution, who shall immediately pay over the moneys received thereon to the several parties entitled thereto, taking receipts therefor, which shall be transmitted to the Secretary of State." Section 3 (page 193) requires the superintendent or other officer, before forwarding the pay roll to the Secretary of State, or receiving a warrant issued thereon, to give a bond to the State for the benefit of whomever it may concern, conditioned that he will faithfully pay over the moneys received by him on the warrant to the several parties entitled thereto. Section 4 requires all institutions and boards whose officers or employees are to be paid monthly to give the names of all persons so paid, with the rate of compensation of each and the aggregate amount paid to each,

in their annual or biennial reports to the Governor or legislature. Section 5 repeals all laws and parts of laws, so far as they are in conflict with the act.

It will be observed that this law does not in terms repeal, amend or modify in any way, Section 2398. And repeals or amendments by implication are not favored. It is the duty of the court to give force and effect to all legislative enactments when it can do so without violence to the language used or the recognized rules of interpretation. "It is a reasonable presumption," says this court in *Booth's Will*, 40 Or. 154 (61 Pac. 1135, 66 Pac. 710), "that all laws are passed with knowledge of those already existing, and that the legislature does not intend to repeal a statute without so declaring. It is therefore the duty of the court to adopt any reasonable construction that will give effect to both acts, and, in order that one may have the effect of repealing another by implication, its conflict with the former act must be 'so positive as to be irreconcilable by any fair, strict or liberal construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject.'" Now, there is no difficulty in construing Section 2398 and the act of 1905 so that both can stand. The former is a general law, intended to prohibit the issuing of warrants on any claim against the State unless there is an unexpended appropriation for its payment. The latter merely regulates the mode and method of procedure in the matter of the payment of the salaries of the officers and employees of certain state institutions and boards. Its manifest design was to make the payment of the salaries of such persons monthly, to simplify the procedure in the office of the Secretary of State, and to relieve that office and that of the State Treasurer of the extra labor, and the State of the expense, of issuing a warrant to each individual, and paying and keeping an account thereof. Heretofore, in most instances, the salaries of all state employees were payable quarterly, and the law required the issuance of a warrant for each separate claim. This was not only inconvenient to the employees, but entailed an unnecessary

expense on the State. To obviate this inconvenience and expense, the law of 1905 provides for but one warrant covering the monthly pay roll, and makes the payee a disbursing officer of the money received thereon. The warrant, when issued, does not belong to him. He has no claim to it in his own right. His duty is to receive and cash the warrant, and "immediately pay over the money received thereon to the several parties entitled thereto." Before receiving the warrant or the money he is required to give a bond to the State for the faithful performance of his duties, and the law plainly contemplates that the money on the warrant shall be received from the State Treasurer. The beneficiaries are officers and employees of the State, and their compensation or salaries are payable from state funds. The law is but a simple and convenient method of making such payments. How can this be done unless there is an appropriation for such purpose, when the constitution provides that no money shall be paid from the state treasury except in pursuance of an appropriation made by law? Const. Or. Art. IX, § 4.

The only substantial change made by the act of 1905 in the method of paying the employees of the asylum from that provided in Section 3617, B. & C. Comp., adopted in 1882, is that one warrant shall issue to the superintendent covering the entire amount of the monthly pay roll, and he shall receive and disburse the money in place of a warrant issuing to each individual employee; and it is argued that it was therefore the intention of the legislature by the latter act to re-enact the law so far as the issuance of a warrant in payment of the employees of the asylum is concerned, as it was prior to the passage of Section 2398. But this would make the act of 1905 apply in one way to the asylum, and in quite another to the other institutions and boards named therein. In the case of the asylum the Secretary would be required to issue a warrant on the approved pay roll, whether there was an appropriation or not, and in all other cases he would be prohibited from so doing. Such an intention cannot be attributed to the legislature. The law of 1905 is not an amendment of Section 3617, but is an original act, and was intended to apply alike to all the institutions and boards named therein. It does not change or modify the law prohibiting the Secretary

from issuing a warrant unless there is an unexpended appropriation applicable to its payment, and the judgment of the court below is affirmed. AFFIRMED.

Decided 3 July, 1905.

TUCKER v. OTTENHEIMER.

81 Pac. 360.

ADMINISTRATORS—AGREEMENT FOR LIEN ON LANDS—VALIDITY—STATUTE OF FRAUDS.

Where an administrator and another had succeeded to all the interests of the estate, and, the personal property being exhausted, such parties agreed that the commissions due the administrator, together with moneys advanced by him individually, should be a lien on the lands of the estate, and in pursuance of the agreement the administrator entered into possession of the lands, and it was agreed that the profits should be divided according to the interest of the parties, the agreement was void, under the statute of frauds, and the administrator not entitled to enforce his lien in equity.

From Baker: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE WOLVERTON.

This was originally an ejectment action commenced by a corporation called S. Ottenheimer Estate against John A. Tucker, who answered by a cross-bill seeking equitable relief. It sets out, in substance, that the defendant, the S. Ottenheimer Estate, is a corporation, its purposes being to conduct the business of such estate, the stockholders being the heirs of S. Ottenheimer; that on July 27, 1884, one Harry A. Johnson died, leaving as his heirs at law, his mother, Samantha Johnson, his half-brother, Charles Herring, and his half-sister, Elizabeth Herring (now Baldock); that Johnson at the time of his death was the owner of certain real property, which is described; that thereafter, in 1892, plaintiff purchased the Baldock interest; that, shortly after the decease of Johnson, plaintiff was appointed administrator of his estate, and took possession of the property thereof; that he regularly proceeded with the administration, and on October 5, 1894, duly filed his final account as such administrator, which was on November 6th following settled and approved, and the plaintiff discharged; that at the time of such final settlement S. Ottenheimer had succeeded by purchase to an undivided two-thirds interest in the real property, and plaintiff to the remaining one-third interest, the whole being subject to the debts of the deceased and the expenses of administration; that pending

the administration there was forced upon the administrator certain litigation, causing much expense and depreciation of the property of the estate; that at the time of such final settlement the personal property had been exhausted, and aside therefrom the plaintiff had advanced and paid out on his individual account in meeting the expenses \$3,045.75; that his commissions as administrator amounted to \$269.72, aggregating, with the costs of final settlement, \$3,440.42, all of which were allowed plaintiff upon such final settlement; that by the express consent and understanding of the said S. Ottenheimer and the plaintiff, as such administrator, with a view to effecting a final settlement out of court, it was agreed that the said sums aggregating \$3,440.42 should be and remain a lien upon the real property in the nature of an equitable mortgage, and that plaintiff should enter into possession of the same, and the whole thereof, and out of the proceeds, rents and profits arising therefrom, or from the sale of the premises, in case of a sale being made, should be paid such demands, with interest, and that the balance of the property remaining should be divided between the plaintiff and Ottenheimer according to their respective interests; that plaintiff immediately entered into possession of said real property with the express consent of Ottenheimer, and so continued in possession until the latter's death, in January, 1898, and has since remained in such possession by virtue of said agreement with him.

The plaintiff then shows some receipts for rentals by Ottenheimer, and other matters of account touching the product of the land, and also some complications arising by way of attachment, and alleges that, while plaintiff was so in possession with the consent of Ottenheimer, he made certain valuable and necessary improvements upon the land, by erecting a dwelling house thereon at a cost of about \$400 a barn at \$100, and clearing up and reducing to cultivation 20 acres of land at a cost of \$40, and that the defendant corporation claims some interest in the land as successor to S. Ottenheimer. The prayer is that upon final hearing plaintiff be decreed to be the owner in fee of an undivided one-third of the land; that defendant be decreed to be indebted to plaintiff in the sum of \$458.22, the amount due

plaintiff on account of the rents, issues, and profits, and permanent improvements, and the further sum of \$2,293.60, with legal interest, being two-thirds of the amount of the equitable lien claimed upon the land; that said lien be foreclosed, and the land sold to satisfy the demand; and for other relief. A motion was filed to strike out many parts of the complaint, which was sustained, being treated as a demurrer; and, the plaintiff refusing to plead further, the cause was dismissed, and he appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. Thomas Harrison Crawford*, with a brief over the names of *Crawford & Crawford* and *Ramsey & Oliver*, to this effect.

I. The taking possession by Tucker and the making of permanent valuable improvements thereon under the oral contract and agreement with S. Ottenheimer was a sufficient part performance to avoid the statute of frauds: *Odell v. Morin*, 5 Or. 96; *Whiteaker v. Vanschoiack*, 5 Or. 113; *Brown v. Lord*, 7 Or. 302; *Wagonblast v. Whitney*, 12 Or. 83 (6 Pac. 399); *Cooper v. Thomason*, 30 Or. 161 (45 Pac. 296); *Barrett v. Schleich*, 37 Or. 613, 617 (62 Pac. 792); *Pugh v. Spicknall*, 43 Or. 489, 494 (73 Pac. 1026, 74 Pac. 485); *Moulton v. Harris*, 94 Cal. 420 (29 Pac. 706); *Ford v. Steele*, 31 Neb. 521 (48 N. W. 271); *Taylor v. Von Schroeder*, 107 Mo. 206 (16 S. W. 675); *Pomeroy*, Spec. Perf. § 115.

II. The facts alleged in the amended cross-bill and admitted by the demurrer, make out clearly a case of equitable fraud, upon which the court will hold the defendant ex maleficio a trustee of the legal title to these lands to be sold and disposed of under the direction of the court, for the payment of plaintiff's claim and the division of the balance of the proceeds in accordance with the contract between plaintiff and S. Ottenheimer: *Perry, Trusts*, § 191; *Hill, Trustees* (4 Am. ed.), 234; 2 *Pomeroy*, Eq. Jur. 1053-1055; *Paine v. Wilcox*, 16 Wis. 202, 217; *Cutler v. Babcock*, 81 Wis. 195 (29 Am. St. Rep. 882, 889, 51 N. W. 420); *Laing v. McKee*, 13 Mich. 124 (87 Am. Dec. 738); *Wilson v. Eggleston*, 27 Mich. 260; *Beegle v. Wentz*, 55 Pa. 369

(93 Am. Dec. 762); *Seichrist's Appeal*, 66 Pa. 237; *Goodwin v. McMinn*, 193 Pa. 646 (74 Am. St. Rep. 703, 44 Atl. 1094); *Ahrens v. Jones*, 169 N. Y. 555 (88 Am. St. Rep. 620, 62 N. E. 666); *Brison v. Brison*, 75 Cal. 525 (7 Am. St. Rep. 189, 17 Pac. 689); *Hays v. Gloster*, 88 Cal. 560 (26 Pac. 367); *Larmon v. Knight*, 140 Ill. 252 (33 Am. St. Rep. 229, 29 N. E. 1116); *Rollins v. Mitchell*, 52 Minn. 41 (38 Am. St. Rep. 519, 53 N. W. 1020).

For respondent there was an oral argument with a brief by *Mr. William Fontaine Butcher* (*Butcher & Correll*, counsel), to this effect.

1. The order of the county court pretending to settle this title on Tucker under an alleged trust agreement with Ottenheimer was absolutely void, for probate courts in this State have nothing whatever to do with the title to real property, being concerned only with disposing of whatever title or interest deceased had, in order to pay his debts: B. & C. Comp, § 1221; *Hanner v. Silver*, 2 Or. 336; *Pryor v. Downey*, 50 Cal. 388 (19 Am. Rep. 656); *Horton v. Barto*, 17 Wash. 675 (50 Pac. 587).

2. Appellant claims some kind of an equitable lien or trust and seeks some sort of performance of something not promised to be done in the alleged parol agreement, but presumed by him to be what should be the result of the alleged parol contract. It is the very essence of this conception that, while the lien continues, the possession of the thing upon which the lien is claimed remains with the debtor, subject to the incumbrance: 1 Pomeroy, Eq. Jur. § 165; 2 Pomeroy, Eq. Jur. § 1233.

3. Where, as here, the claim is of an express contract, it must be in writing (*Dayget v. Rankin*, 31 Cal. 321, 327; *Chase v. Peck*, 21 N. Y. 581, 583; *McQuie v. Peay*, 58 Mo. 56); and there must be a valuable and adequate consideration: 1 Pomeroy, Eq. Jur. §§ 370, 372; *Eaton v. Patterson*, 2 Stew. & P. 9.

4. To take this case out of the class controlled by the statute of frauds, part performance must be shown that is referable only to the contract claimed: *Waterman*, Spec. Perf. § 261; *Morgan v. Bergan*, 3 Neb. 209, 213; *Cutler v. Babcock*, 81 Wis. 195 (29 Am. St. Rep. 882, 886, 51 N. W. 420); *Emmel v. Hayes*,

102 Mo. 186 (22 Am. St. Rep. 769, 772, 11 L. R. A. 232, 14 S. W. 209); *Wallace v. Rappelye*, 103 Ill. 229, 252.

5. Where the contracting parties already maintain such relations as to preclude the possibility of surrendering and taking possession under and in pursuance of the contract (in the present instance the parties were tenants in common), there cannot be a part performance that will take the case out of the rule of the statute: *Workman v. Guthrie*, 29 Pa. 495, 511; *Cutler v. Babcock*, 81 Wis. 195 (29 Am. St. Rep. 882, 886, 51 N. W. 420); *Emmel v. Hayes*, 102 Mo. 186 (22 Am. St. Rep. 769, 772, 11 L. R. A. 232, 14 S. W. 209).

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The only question presented by the appeal is whether the cross-bill states facts entitling the plaintiff to equitable relief. The order of final settlement referred to in the complaint is made a part thereof, and shows that the estate was finally settled and the administrator discharged, and it was ordered by the court, among a great many other things, that the amount allowed the administrator over and above the receipts, to wit, the sum of \$3,440.42, be declared a lien upon the real estate of the deceased. After ascertaining the present ownership of the real estate, the order further recites "that each and all the said parties are desirous and anxious that said estate should be finally settled, and that the charges thereon growing out of the administration of said estate should be ascertained herein, and that same should be made a charge upon the said real estate, to be hereinafter settled and adjusted and paid by the several owners thereof in accordance with their equities therein," and thereupon decrees that "said administrator turn over to the said parties * * all of the real estate belonging to said estate, and that the said several parties take the said real estate subject to the said lien in favor of this administrator for the said sum of \$3,440.42, the same to be adjusted and settled between them in such manner and by such course or process as they may adopt therefor." There was no appearance by any of the heirs or their successors, except the administrator himself.

The verbal contract relied upon is not a contract for the sale of land where the purchaser has gone into possession in pursuance of it and made valuable improvements, nor is it a contract to give or execute a mortgage or other instrument with a view to creating a lien upon the premises, but it is set forth as itself creating the lien, and reliance is had thereon solely for the equitable relief prayed for. It is conceded that the county or probate court had no power or authority to adjudge a lien upon the realty of the estate in favor of plaintiff so as to bind the heirs, and its order or decree is not relied upon as within itself impressing the lien.

A verbal contract for a mortgage, based upon a consideration, where there has been part performance in pursuance of the contract, may be specifically enforced, upon the same principle as equity will enforce a verbal contract for the sale of realty. The ground of the equity is well stated in *Dean v. Anderson*, 34 N. J. Eq. 496, 500: "Where an agreement has been executed or in part performed by the complainant, and the acts done place him in a situation which is a fraud upon him unless the agreement is executed, equity will not permit the defendant to protect himself from executing his part of the agreement by pleading that it was not in writing. The ground upon which this court acts in cases of part performance is fraud in refusing to perform after performance by the other party, and the court will interpose and grant relief, notwithstanding the statute, when the complainant shows a performance on his side, by which he would suffer an injury amounting to fraud by the refusal to execute the agreement on the part of the defendant." The doctrine is well settled: *King v. Williams*, 66 Ark. 333 (50 S. W. 695); *Irvine v. Armstrong*, 31 Minn. 216 (17 N. W. 343); *Hicks v. Turck*, 72 Mich. 311 (40 N. W. 339); *Baker v. Baker*, 2 S. D. 261 (49 N. W. 1064, 39 Am. St. Rep. 776). But such is not the case here. There is no agreement for a mortgage or other lien, and part performance in pursuance thereof. The agreement is direct and explicit between the parties, and itself constitutes the lien, or else there is none. The condition is the same as if one party had attempted by purely verbal arrangement to create a mortgage in favor of another upon realty for

the security of a sum loaned. Could the agreement be enforced, not having been entered into in writing? A mere statement of the proposition shows it so clearly to come within the statute of frauds that it is scarcely necessary to dilate upon the subject. Were such a transaction tantamount to an equitable mortgage, the formal written mortgage would not at all be necessary, and the statute of frauds, as it relates to mortgages of realty, would be a dead letter. A mortgage is in form a conveyance: *Watson v. Dundee Mtg. Co.* 12 Or. 474 (8 Pac. 548). And it should be in writing, and executed with like formalities as a deed; and to permit a debt to be charged upon realty as a lien by verbal agreement would be evasive of the statute. If there has been part performance or possession given, it has been in pursuance of an agreement that never created a lien, and the acts of part performance will not create it. Acts of part performance, as they relate to a contract of sale, will usually create an equity that will afford relief by way of specific performance; but, where neither the contract nor the acts of part performance are tantamount to the creating of a lien, there can be no enforcement of it. The debt in question was not contracted on the credit of the property, and, the agreement being insufficient to impress a lien on account of it, equity will not afford the relief sought: *Bennett v. Nichols*, 12 Mich. 22.

The further contention is made that the defendant should be held to be a trustee ex maleficio of the legal title, subject to the lien of plaintiff for his claim of \$3,440.42. The principle invoked is that it would be a fraud upon the plaintiff to allow the defendant to retain the land, or his part of it, freed of the incumbrance of the indebtedness of the estate, because in reliance upon the alleged agreement the plaintiff was induced to forego his right to sell the land in probate for its payment of such indebtedness. The statement of the complaint is somewhat vague, which is that in order to effect a final settlement of the estate, and get the same out of court, it was agreed that said sum should be and remain a lien upon the real estate in the nature of an equitable mortgage; that plaintiff should enter into possession of the real estate, and that said sum, with interest, should be paid out of the rents and profits thereof, or the sale

of the premises in case sale thereof was made; and that the balance of the property should be divided equally among the parties. The agreement provides for no sale, but that if one should be made, the proceeds should be applied towards the indebtedness, and one would suppose that the intendment was that the rents and profits should finally cancel the demand; the defendant assuming no personal obligations to pay any part of it. Defendant's ownership of the legal estate comes to it naturally enough by descent and purchase, and none of plaintiff's funds have been employed in its acquirement. So there can arise no resulting or constructive trust out of the situation. The only element of mala fides that can be injected into the transaction is that it would be a fraud upon the plaintiff not to let him get his money out of the property, because it was agreed verbally between the parties or their predecessors that the estate's indebtedness should be and remain a lien upon the real estate in the nature of an equitable mortgage. But this brings us back to the first question, which is whether the agreement is within the statute of frauds, and this we have resolved against its validity.

It is urged that plaintiff was induced to waive his lien upon the land for the money due him from the estate, but that stands as the only consideration for the verbal agreement, and, being performed on his part, stands in no stronger light than if he had loaned the money direct to the defendant, and thereupon entered into a verbal agreement depending upon it alone to constitute the lien, or, as it is termed, an equitable mortgage. The agreement is wholly incompetent to impress a lien of any sort, and part performance cannot help the situation. So, too, the entering into possession could not avail for the purpose. If any rights have arisen by virtue of possession and the making of improvements upon the land by assent of the defendant, they do not operate to confer a lien through the verbal agreement which constitutes the very groundwork of his cause of suit.

The cases of *Paine v. Wilcox*, 16 Wis. 215, and *Cutler v. Babcock*, 81 Wis. 195 (51 N. W. 420, 29 Am. St. Rep. 882), so much relied upon, do not seem to us to be in point. In each of these cases the party complained against had obtained the legal title to the property under conditions that it was accounted a fraud

to permit him to retain it, and he was therefore held to be a trustee ex maleficio. But here the conditions are quite the contrary. The defendant has simply come into its own, with a verbal agreement that a lien should be continued thereon; and, while it may be a breach of a void contract for it to disavow the agreement, it has acquired nothing that it would be a fraud upon the plaintiff to permit it to retain. Mortgages do not usually arise ex maleficio, but a trust might.

For these reasons, we do not think the complaint sufficient, and the decree of the trial court will therefore be affirmed.

AFFIRMED.

Decided 10 July, 1905.

ALDEN v. GRANDE RONDE LUMBER CO.

81 Pac. 385.

EVIDENCE—ADMISSIONS OF AGENTS—PAST TRANSACTIONS.

1. In an action against a corporation for the loss of certain horses hired to it by plaintiff, alleged to have been killed or permanently injured by the negligence of defendant's servants, admissions or declarations made by defendant's agents as to the manner in which the horses were used and injured, not a part of the res geste, but mere historical narrative of past occurrences, are inadmissible.

ASSUMED RISK OF EMPLOYMENT—LIABILITY FOR NEGLIGENCE.

2. Where plaintiff let certain horses to defendant corporation for logging purposes, plaintiff assumes all the ordinary risks incident to such employment, and is not entitled to recover therefor, unless the horses were killed or injured through the negligence of defendant or that of its agents and servants.

From Union: ROBERT EAKIN, Judge.

Action by J. F. Alden against the Grande Ronde Lumber Co. From a judgment for plaintiff, defendant appeals. REVERSED.

For appellant there was a brief and an oral argument by *Mr. Charles H Finn*.

For respondent there was a brief over the name of *Crawford & Crawford*, with an oral argument by *Mr. Thomas Harrison Crawford*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an action to recover damages for the loss of three horses hired by the plaintiff to the defendant to work in its logging camp, and alleged to have been killed or permanently injured by the negligence of its agents and servants. The plaintiff was a witness in his own behalf, and testified that one of the horses

was killed at Camp No. 2, in charge of one Johnson as foreman, and the other two were injured at Camp No. 1, in charge of Bean; that after the horses were killed or injured he had a conversation with Johnson and Bean about the matter, and was thereupon asked by his counsel the following question: "You may state whether he (Johnson) told you about it" (meaning the killing of the horse), and over the objection and exception of the defendant he answered that he did. He was then asked: "Now you may state what he told you concerning the matter, and how the horses were killed." This question was likewise objected to, but the objection was overruled, and the witness answered: "The horse ran off a bridge and was killed." He was then asked: "Now, in the conversation you had with him on the day you went up and found the horse was killed, and on the day afterwards, or a few days afterwards, state whether or not in either one of these conversations he stated to you what was the cause of the horse being shoved off the bridge." An objection was likewise made and overruled to this question, and the witness answered: "Johnson claimed the load was not balanced right. That was his opinion. He was not there. He was there afterwards." The court, on motion of the defendant, struck out so much of the testimony as referred to Johnson's opinion, and allowed the remainder of it to stand, and witness was permitted, over defendant's objection and exception, to answer similar questions as to the conversation with foreman Bean concerning the injury to the two horses at Camp No. 1, and the way in which such injury occurred. The testimony was followed by evidence tending to show that, if the accident occurred, or the horses were killed or injured in the manner stated by Johnson and Bean, it was due to the negligence of the defendant and its servants.

1. The evidence as to the statements of Johnson and Bean to the plaintiff concerning the accidents to the plaintiff's horses and the manner in which they occurred were not binding on the defendant, or competent as evidence, because they related to past transactions, and were in the nature of mere historical narrative of past occurrences. The admissions or declarations of an agent are sometimes binding on his principal, but it is only when the act of the agent will bind the principal, and the representations

or statements are made at the time and characterize the act, that they become competent evidence for that purpose: *North Pacific Lum. Co. v. Willamette Mill Co.* 29 Or. 219 (44 Pac. 286); *Wicktorwitz v. Farmers' Ins. Co.* 31 Or. 569 (51 Pac. 75); *Hannan v. Greenfield*, 36 Or. 97 (58 Pac. 888). The admissions or declarations of an agent of a corporation stand on precisely the same footing as those of an agent of a private individual. "To bind the principal, they must be within the scope of the authority confided to the agent, and must accompany the act or contract which the agent is authorized to do or make": Angell and Ames, *Corporations* (1 ed.), § 309. "The rule which admits admissions of an agent in an action against his principal applies only in two cases: (1) Where the scope of the agency is such that the agent is an agent for the purpose of making the particular admission—as, where an attorney, in the course of a trial, makes a solemn admission against the interest of his client. (2) Where the admission is in the form of a declaration made by an agent, while acting within the scope of his agency, and about the business of his principal, concerning such business. In such a case the declaration made dum fervet opus is a part of the *res gestae*. It tends to characterize the act which the agent is doing for his principal at the time. It is regarded as a verbal act; and it is admitted on the principle that the whole transaction, and not merely a part of it, ought to appear, including what was said as well as what was done. But where the declaration of the agent relates to his past conduct, or to a past transaction in which he has acted for his principal, so that it is in the nature of a mere historical narrative, it is not admissible to bind his principal, unless the scope of the agency was such that the agent had authority to make the admission for his principal": *Bevis v. Baltimore & O. R. Co.* 26 Mo. App. 22. The statements of Johnson and Bean as to the manner in which the horses were injured or killed were therefore not binding upon the defendant.

A contention is made that the error based on the admission of such testimony is not properly before this court, because it is said the bill of exceptions "consists of an extension of the reporter's shorthand notes of all the testimony and the proceedings of the court up to the time the respondent rested his case

in chief," and decisions of this court are referred to disapproving bills of exceptions so made up, and refusing to examine them in search of alleged errors in the admission or rejection of testimony. But counsel is mistaken as to the manner in which the bill of exceptions in this case is made up. It is, in substance, in conformity with the rules of practice approved by this court, and has attached to it and made a part thereof a transcript of the stenographer's notes of the trial, which was deemed essential because of the alleged error based on the overruling of defendant's motion for nonsuit.

2. Exceptions were saved by defendant to nearly, if not quite, all the instructions given by the court to the jury, but we infer from the brief that the only error relied upon in that connection is the modification of an instruction requested by the defendant, as follows:

"If you find that the owner of said horses hired them to the defendant for the purpose in which said horses were used and driven when they were driven, and that such horses were used and driven only in the way and in the time and the manner contemplated by such hiring, or by a driver agreed upon, and either the death or the injury resulted from the efforts to accomplish only that which the owner contracted for such horses to perform (and without fault or negligence), then you will find for the defendant."

This instruction was given as requested, except that the court added after the word "perform" in next to the last line the words "and without fault or negligence," and it is insisted that it was error so to modify the instruction. It is doubtful whether there was any evidence tending to show that the horses, or either of them, at the time of the injury, were being driven by a driver agreed upon between the plaintiff and defendant, or that they were driven and used only in the way and the manner and at the time contemplated in the contract of hiring; but, however that may be, if they were injured by reason of the fault or negligence of the defendant, it would be responsible, notwithstanding they may have been driven by a driver agreed upon by the parties, or used in the manner and at the time contemplated in the contract. When the plaintiff hired these animals to the defendant for logging purposes, he, of course, assumed all the

ordinary risks that are incident to such employment; and if they were killed or injured without the fault or negligence of the defendant or its agents and servants, the plaintiff cannot recover, but if they were killed or injured through the negligence or want of skill or ordinary caution on the part of the defendant, then it is liable. This, it seems to us, is the legal effect of the instructions as given by the court upon the trial, and they constitute a fair statement of the law of the case.

It follows from these views that the judgment of the court below must be reversed, and it is so ordered. **REVERSED.**

Decided 10 July, 1905.

HAYES v. HORTON.

81 Pac. 386.

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**RESULTING TRUST NOT PRESUMED BETWEEN HUSBAND AND WIFE—
PRESUMPTION OF GIFT.**

1. In the case of a purchase of land by a husband, the title being taken in the name of his wife, or in the name of himself and wife, it will be presumed that the purchase price was an advancement or gift to the wife, rather than that the title was held by the wife as trustee.

EFFECT OF DEED TO HUSBAND AND WIFE—ENTIRETIES.*

2. A deed to a husband and wife creates an estate by entirety, even though the husband provided the purchase price, in the absence of evidence of a trust.

EFFECT OF DIVORCE ON ESTATE BY ENTIRETY.

3. The effect of a divorce between persons holding land by the entirety is to dissolve that estate and leave them as tenants in common.

EFFECT OF CONVEYANCE ON ESTATE BY ENTIRETY.

4. Either party to an estate by entirety may mortgage his or her interest without changing the status of the property right of the other party thereto.

WAIVER OF DEMURRER TO COMPLAINT BY ANSWERING.

5. A general demurrer to a complaint is waived by answering over, unless there is an entire failure to state any cause of action at all.

From Harney: **GEORGE E. DAVIS**, Judge.

Statement by **MR. JUSTICE BEAN**.

This is a suit by Etta Hayes against Horace M. Horton for partition of real property. The plaintiff and defendant were wife and husband from December, 1888, to April 27, 1903, when they were divorced by a decree of the circuit court for Harney County in a suit brought for that purpose by the defendant. In May, 1891, the property in question was purchased by the defend-

*NOTE.—See extensive annotation in 30 L. R. A. 320, on Creation of Entirety Estates, (a) by act of law, and (b) by act of the parties.

ant, and, at his instigation, conveyed to himself and wife. He soon thereafter constructed a building thereon, and otherwise improved the property, at a cost of between three and four thousand dollars, and has occupied and used the same for a drug store ever since. The plaintiff, about the commencement of the divorce suit, conveyed her interest in the property to her attorney Williams, "in consideration of one dollar and professional services" to be rendered to her. After the termination of the suit Williams reconveyed the property to her, and she thereafter commenced this suit for partition thereof. In her complaint she alleges that she and the defendant "are the owners in common" of the property, "each owning an undivided part thereof"; that the property is so situated that it cannot be divided without great prejudice to the owners; and praying for a sale and for the distribution of the proceeds. The answer denies that the plaintiff is the owner or has any interest in the property, alleging that it was purchased by the defendant and paid for with his own money, and that it was not intended at the time of the conveyance that plaintiff should acquire any beneficial interest therein whatever. The answer further alleges that the improvements were made by the defendant at his own expense and with his own money, with the full knowledge and consent of the plaintiff, and prays that plaintiff be decreed to hold the legal title in trust for him; but, in case the court should find that she is the owner of an interest therein, that she be required to account to the defendant for her share of the money expended by him in the purchase and improvement thereof. The reply denies the material allegations of the answer, and affirmatively alleges that plaintiff advanced the defendant large sums of money which were used in the purchase and improvement of the property, and that it was understood and agreed between them that the property was to be owned and held by them jointly. The plaintiff had a decree in the circuit court, and defendant appeals. **AFFIRMED.**

For appellant there was a brief over the name of *Parrish & Rembold*, with an oral argument by *Mr. G. A. Rembold*.

For respondent there was a brief over the names of *Biggs & Biggs* and *George Wesley Hayes*, with an oral argument by *Mr. Hayes*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. There is a conflict in the evidence as to whether defendant furnished the money with which to purchase and improve the property in dispute, or whether a part of it was provided by the plaintiff, but that question is really immaterial. It is a general rule of law that where the purchase price of land is paid by one person, and the title taken in the name of another, the grantee will hold it in trust for the person furnishing the money, even without a declaration to that effect: 2 Story, Eq. (13 ed.), § 1201. But this rule does not apply to a purchase by a husband in the name of his wife, or by a parent in the name of a child. In such case the presumption is that the purchase money was intended as an advancement or gift, until the contrary is established by the evidence: 2 Story, Eq. (13 ed.), § 1203; *Welton v. Divine*, 20 Barb. 9; *Guthrie v. Gardner*, 19 Wend. 414. If, therefore, it be assumed, although not clearly shown by the evidence, that the purchase of the property and the improvements thereon were made with the defendant's money, there can be no resulting trust in his favor on account thereof, because there is no evidence to overcome the presumption that it was intended as a gift to her. Indeed, the testimony on this point tends to show that plaintiff was to be joint owner of the property. She says that it was understood at the time the deed was made that she was to have a one-half interest, while the defendant testifies that there was no understanding about the title, and that his claim is based on the fact that he provided the purchase money. We are therefore of the opinion that there was no resulting trust in favor of the defendant.

2. We are further of opinion that by the deed Horton and the plaintiff became tenants by the entirety: *Noblitt v. Bebee*, 23 Or. 4 (35 Pac. 248); *Howell v. Folsom*, 38 Or. 184, 187 (63 Pac. 116, 84 Am. St. Rep. 785).

3. There is some conflict in the decisions as to the effect of a divorce upon estates by entirety, but the weight of authority is

that it destroys the unity of husband and wife and severs such estate, making them thereafter tenants in common: 2 Bishop, Mar. & Div. (5 ed.), § 716; Freeman, Co-Tenancy (2 ed.), § 76; *Stelz v. Shreck*, 128 N. Y. 263 (28 N. E. 510, 13 L. R. A. 325, 26 Am. St. Rep. 475); *Russell v. Russell*, 122 Mo. 235 (26 S. W. 677, 43 Am. St. Rep. 581); *Hopson v. Fowlkes*, 92 Tenn. 697 (23 S. W. 55, 23 L. R. A. 805, 36 Am. St. Rep. 120). At common law, husband and wife were regarded as one person, and a conveyance to them by name was in effect a conveyance to a single person. By such a conveyance two real persons took the whole of the estate between them, and each was seised of the whole, and not of any undivided portion. When the unity was destroyed by death, the survivor took the whole of the estate, because he or she had always been seised of the whole thereof, and the other had no interest which was devisable. But when the unity is destroyed by a decree of divorce, leaving both spouses surviving, the only logical conclusion is that they thereafter become tenants in common of the property, because there are two living persons in whom the title rests.

4. The deed from the plaintiff to Williams, made about the time of the commencement of the divorce suit, did not change the status of the property or the rights of the parties. It was probably intended only as security for professional services, and the title reinvested in the plaintiff immediately after the decree.

5. A contention is made that the complaint does not state facts sufficient to constitute a cause of suit, because it is not alleged specifically what interest or estate the parties had in the property, but this question was waived by confessing that a demurrer to the complaint was not well taken, and by answering over.

It follows that the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Argued 29 June, decided 31 July, 1905.

CURTZE v. IRON DYKE MINING CO.

81 Pac. 815.

CONSTRUCTION OF POWER OF ATTORNEY TO MORTGAGE—RATIFICATION.

1. A power of attorney authorizing the agent to borrow money and secure the repayment thereof by mortgaging specified property in the hands of a receiver, but which the principals had arranged to buy, is broad enough to sustain a mortgage given for not only the purchase price but for money necessary to clear away outstanding liens against the title, it being evidently the intention of the principals to procure an unincumbered title, and the report of the agent having been promptly submitted and received without objection.

CONSTRUCTION OF VOTING TRUST CONTRACT.

2. A corporation was organized to purchase certain mining and railroad property subject to a mortgage, which the corporation assumed. A voting trust agreement was executed, which stipulated that 395,000 shares of the corporation's stock should be issued to one of the mortgagees as trustee, and that such shares should be voted by him for such directors as the trustee and certain others should jointly direct, and that the trustee or his successor should not vote to sell below par any of the 100,000 shares of the particular stock remaining in the treasury, and none of the parties should sell any of the shares held in trust without the written consent of the others until August 1, 1905, unless the mortgage and liens on the property should be sooner paid, and the treasury stock sold and paid for. The first draft of the trust agreement contained a provision extending the time for payment of the mortgage, but this was eliminated. *Held*, that such trust agreement did not effect an extension of the mortgage until the date specified for the termination of the trust.

MORTGAGE—USURY.

3. Where one of the owners of certain options on unpatented mining claims, being largely indebted to C. and two of his associates, among others, made a settlement with them, in which he agreed to pay \$20,000 and one-tenth interest in such options conditionally on his being able to acquire title to the property, which amount should come out of the property, in order to induce C. and his associates to permit their attorney to act for him in the matter, and thereafter, when it became apparent that such owner would lose the property, and C. and his associates would get nothing by their settlement unless they could raise more money, they agreed with their other coplaintiffs that, if they would join in raising such additional money to clear the title, they would divide the amount, giving to them under the settlement pro rata, and the settlement agreement took place more than a year prior to the execution of the mortgage on the claims to secure the money raised, and the amount fixed by the settlement was not included in the mortgage, such agreement was insufficient to sustain a defense of usury.

AMOUNT DUE ON MORTGAGE—FACTS.

4. The testimony shows that the receiver's certificates which were included in the mortgage in question were the property of the mortgagee.

From Baker: **ROBERT EAKIN**, Judge.

Statement by **MR. JUSTICE BEAN**.

This is a suit by **F. F. Curtze** and others against the **Iron Dyke Copper Mining Co.** and others to foreclose a mortgage on certain mining property in **Baker County** and on a right of way for a railway from **Huntington** down **Snake River** to or near such property. The plaintiffs and the defendant **Charles M. Reed** are all residents of **Erie, Pennsylvania**. The defendant the

Iron Dyke Copper Mining Co. is a South Dakota corporation, but its stockholders are residents of Erie, and its principal office is in that city. The mortgage sought to be foreclosed was made on the 19th day of February, 1902, in this State, by Louis Rosenzweig, as attorney in fact for the defendant Reed and one Charles M. Warner, who were at that time the owners of the mortgaged property. The mining property formerly belonged to the Northwest Copper Co., an Oregon corporation, and was sold under a decree of the Circuit Court of the United States for the District of Oregon, and bid in by Warner, as the agent of Reed, for \$85,000, he paying \$10,000 in cash at the time of his bid. The decree for the sale provided that the settlement of the accounts of the receiver theretofore appointed in the suit should be reserved for further adjudication, and that until the purchaser should be put in possession after a confirmation and conveyance to him, the receiver should remain in possession, preserve and protect the property, and comply with the provisions of the leases and options under which the copper company held the mining property, and to that end he might from time to time borrow money and issue receiver's notes and certificates for such amounts as might be necessary to make any payments falling due upon such options and to carry on the work of the mine. The railway property formerly belonged to the Northwest Railway Co., an Oregon corporation, and was bid in by the defendant Reed at a sale under a decree of the United States court for \$35,000, \$5,000 of which was paid at the time. Both the copper company and the railway company were corporations promoted and attempted to be financed by Reed, but, as he was unable to keep them afloat, he brought a suit in the United States circuit court for the District of Oregon in August, 1899, for the appointment of a receiver and the sale of the property, and the sales heretofore referred to were made in pursuance of decrees rendered therein. The assets of the mining company at the time the suit was begun by Reed consisted principally in options to purchase unpatented mining claims. In order to preserve such options and meet the payments thereon as they became due, the receiver, by order of the court, issued and sold a large amount of receiver's certificates, but was unable to raise sufficient money for the purpose, and in January,

1901, Reed borrowed of the plaintiff Conrad \$20,000 with which to take up one of the options. Of the money so borrowed of the plaintiff \$18,400 was paid to the First National Bank of Baker City, and a deed for the mining property held in escrow by the bank was by the consent of Reed and the receiver delivered to Conrad as security for the money so borrowed. The balance of the \$20,000 was paid to the receiver to meet the monthly pay rolls, except \$100, which was used by Reed's attorney for personal expenses incident to the trip to Oregon from Pennsylvania to attend to the business. On February 1, 1901, at the request and solicitation of Reed, the plaintiffs advanced for the purpose of paying the balance due on the bids of himself and Warner and the expenses of the receivership, so that title could be obtained to the mining and railway properties, the sum of \$100,000 in cash and \$46,188.96 in receiver's certificates. The money and the receiver's certificates were delivered to Mr. Rosenzweig, of Erie, Pa., who was the attorney for all the parties, and who was given at the time a power of attorney by Reed and Warner, authorizing him to mortgage the property acquired by them through the sales under the decrees of the United States court. Mr. Rosenzweig came to Oregon, settled up the receivership, paid to the parties interested and to the clerk of the court the amount necessary to secure deeds to Warner and Reed for the property bid in by them. He caused these deeds to be placed of record in Baker County on the 18th of February, 1902, and on the next day executed the mortgage now in suit to secure the payment of the \$100,000 advanced by the plaintiffs on February 1st, the \$20,000 previously borrowed of Conrad, and the \$46,188.96 of receiver's certificates which had been by him turned in as cash, making a total of \$166,188.96; the respective amounts due and payable to each of the parties being specified in the mortgage. At the time the power of attorney was given by Reed and Warner to Rosenzweig, they executed a deed to the plaintiffs for an undivided one tenth of all the property they should thereafter acquire through their purchase at the master's sales under the decrees of the federal court. On April 2, 1902, Warner conveyed by deed the remaining nine tenths to Reed, and on April 7, 1902, Reed and the plaintiffs by a joint deed conveyed all the property to the

defendant the Iron Dyke Copper Mining Co., which had been organized by Reed, or under his direction, to take the title. The deeds from Warner and from Reed and the plaintiffs to the mining company were each made subsequent to the mortgage in favor of the plaintiffs, and the grantees therein expressly assumed and agreed to pay such mortgage as a part of the purchase price. But, default being made in the payment, this suit was instituted. Answers were filed on behalf of Reed and the Iron Dyke Copper Mining Co., setting up practically four defenses: First, that the mortgage, as executed, was not within the power or authority conferred upon Rosenzweig by the power of attorney from Reed and Warner to him; second, that the time of the payment of the mortgage had been extended by a subsequent agreement between the parties; third, that the contract for the loan by the plaintiffs to the defendants is usurious; and, fourth, that the amount stated in the mortgage is in excess of that actually due the plaintiffs.

AFFIRMED.

For appellants there was a brief over the names of *Williams, Wood & Linthicum*, and *Emmet Callahan* (*M. O. Reed*, of counsel), with an oral argument by *Mr. Charles Erskine Scott Wood*.

For respondents there was a brief and an oral argument by *Mr. John Langdon Rand*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. The power of attorney from Warner and Reed to Rosenzweig, and under which the mortgage in suit was executed, authorized him for and in the name of his principals "to acquire a loan of money, not to exceed \$200,000, and, for the purpose of securing the lender or lenders of said money, to grant, bargain, sell, convey, and mortgage unto the said lender or lenders" the mining and railway property to be acquired by them under their purchases at master's sales pursuant to the decrees of the United States circuit court in the suits brought by Reed against the Northwest Copper Co. and the Northwest Railway Co. It is contended that this power of attorney is a limited or special grant of power to borrow money, and did not authorize Rosenzweig to include in the mortgage executed by him previously

existing debts against the receiver, or liens on the property, although their extinguishment was necessary in order to vest the title in Reed and Warner. The condition of the title and the situation of the parties at the time the power of attorney was executed, and the object to be accomplished by it, show clearly that it was intended to enable Rosenzweig to mortgage the property for sufficient to clear the title. Reed and Warner had bid in the property, but had not been able to pay the purchase price. They were anxious to close up the transaction and secure title. To do this it was necessary to meet the balance due on their bids and take care of the expenses of the receivership and the \$20,000 previously borrowed of Conrad, and for the security of which he held a deed to a part of the property.

After protracted negotiations, it was finally agreed between Reed and the plaintiffs that the latter would advance for the purpose stated \$100,000 in cash, and the plaintiff Curtze, who held in his own right and as the representative of a local bank \$46,188.96 in receiver's certificates, would surrender them up for cancellation, and take a mortgage on the property in his favor to secure the payment thereof, and that the plaintiff Conrad would surrender his lien and take a mortgage in lieu thereof. It was mutually agreed that Rosenzweig should come to Oregon and act for and represent all the parties interested in closing up the transaction. It was in pursuance of these arrangements that the money and receiver's certificates were delivered to him by the plaintiffs and the power of attorney given by Reed and Warner. It is therefore quite probable that the mortgage as executed was within the power conferred. The power to borrow money and secure the same by mortgage for the purpose of paying certain obligations would, it seems, include the power to satisfy and discharge such indebtedness by arranging with the holders thereof to postpone the time of payment and accept security therefor by mortgage. But, however that may be, as an original proposition it is not important here. The mortgage as executed was manifestly given in pursuance of the understanding and agreement of all the parties, and it accomplished the purpose intended. Immediately after Mr. Rosenzweig returned to Pennsylvania he made a written report to the parties inter-

ested, giving in detail and at length a statement of his transactions, including the execution of the mortgage, the amounts of money received and expended by him, from whom received and to whom paid, and no objection was made thereto by any one until after this suit was commenced. The objection now made, therefore, that the mortgage was not strictly within the terms of the power, should not prevail.

2. On the 5th of August, 1902—two days before the mortgaged property was conveyed to the defendant corporation—the owners thereof, being the plaintiffs and the defendant Reed and one Mrs. Shatto, who claims an interest therein, entered into a written agreement, which agreement, after reciting that the parties thereto were willing to accept the offer of the mining company to purchase the property subject to the mortgage and other liens thereon for \$4,000,000 of its capital stock, stipulated that 395,000 shares of such stock should be issued by the corporation to the plaintiff F. F. Curtze, as trustee, and 5,000 shares to the defendant Reed, or whoever he might direct; and the shares issued to Curtze should be voted by him for such directors of the corporation as himself, Reed, Conrad, Fink and Sproul, who represented Mrs. Shatto, should jointly direct. It was further stipulated that the trustee or his successor should not vote to sell below par any of the 100,000 shares of the capital stock of the company remaining in the treasury, and that during the continuance of the agreement none of the parties should sell or assign any part of the shares held in trust by Curtze without the consent in writing of all the others. This agreement, by its terms, was to continue irrevocably until August 1, 1905, unless the mortgage and liens on the property and the indebtedness of the company were in the mean time paid, and the treasury stock sold and paid for. At the termination of the agreement the shares issued to Curtze should be divided among the subscribers in certain specified amounts.

Now it is contended that this agreement, which was, in effect, a mere voting trust or pooling arrangement, operated in some way to postpone the payment of the mortgage to the plaintiffs until August 1, 1905, unless a sufficient amount of the stock of the defendant corporation was sold in the mean time to pay

the same. It was the evident purpose of the agreement to vest the title of the stock to which the subscribers were entitled in a trustee, so as to facilitate the management of the corporation, to protect the rights of interested parties, and to expedite the sale of the treasury stock, and it was no doubt thought at the time that money could be promptly raised by the sale of such stock with which to pay the indebtedness, including the plaintiffs' mortgage. But there is no provision in the agreement which can be construed as extending the time for the payment of the mortgage, and that such was not the intention of the parties is evident from the fact that the first draft of the pooling or trust agreement contained such a provision; but it was eliminated because some of the parties refused to agree to an extension. There is nothing, therefore, in this point even if the defense that the suit is prematurely brought was not waived by joining it with an answer to the merits: *Hopwood v. Patterson*, 2 Or. 49.

3. It is contended that the loan to secure which the mortgage was given was usurious. The answer avers that, in addition to the stipulated interest, the borrowers agreed to pay to the plaintiffs, as a bonus for such loan, \$20,000 in cash and one tenth of the mortgaged property. This averment is denied by the plaintiffs, and upon the issue thus joined there is a conflict in the testimony. But the decided weight of the evidence is, in our opinion, with the plaintiffs, and supports the findings of the trial judge. Mr. Rosenzweig, an attorney in good standing at the bar, and evidently a man of credit and respectability, who arranged the loan and is familiar with the entire transaction, says that more than a year before the loan was made he was employed by the plaintiffs Curtze, Fink and Metcalf to represent them in the matter of a claim they asserted against Reed and the property then in the hands of the receiver in Oregon, and for that purpose came to Oregon to investigate the situation. Soon after his return home, Reed desired to retain him to assist in extricating him (Reed) from his financial difficulty, and what occurred is thus related by the witness:

"Mr. Reed and Mr. Conrad came to my office, stating that Mr. Reed desired to employ me. I said that I was tied up to these other people, and that they would have to adjust the matter with them before I could be released. It was suggested that Mr. Curtze

be sent for, and after phoning for him or sending for him we talked it over, and then Mr. Curtze was directed to see Mr. Fink and Mr. Metcalf, and he came back and stated to me, of which I informed Mr. Reed, that they would not release me; that Reed had got them into trouble, and that they did not purpose, after they had expended money in educating a man in the conditions out here, that Reed should have the benefit of it. After several conversations we got down to an agreement, by which it was agreed that I was to be free to represent Reed in his western matters on condition that he would give a note for the amount of money that they had expended in prosecuting their claim, less \$500 of my fees, and \$20,000 and a one-tenth interest conditionally upon Mr. Reed's acquiring title to the property, and to come out of the property. At the time Reed did not have title to the property. It was in jeopardy. There was a controversy in the United States court. It was a doubtful title at the best.

"After these parties, the present plaintiffs, proposed this large loan, Fink and Metcalf claimed this entire amount as their settlement. I told them it would only make a controversy between the parties they borrowed the money from, and I did not want to be a party to that, or have any more controversy between them, and whatever they agreed upon was to be divided pro rata among them. Fink, Curtze and Metcalf were to realize on their respective claims pro rata with the other people. In other words, the \$20,000 coming to Fink, Curtze and Metcalf, as originally intended, and the one-tenth interest, I divided up in proportion to every man's interest who furnished the money, so as to put them on an equality. This \$20,000 and the interest in the property was not offered by Reed or accepted by the plaintiffs as an inducement to make the loan, nor was it intended as a bonus for that purpose. It was to induce these people to let me act for Reed in these western propositions, and was contingent upon his getting title. It was called a bonus to protect Reed. There was some \$100,000 in other claims in the same condition as those adjusted, and if the people had known the situation they would have employed some lawyers to do just exactly what I did, and compel Mr. Reed to sell or make a settlement. It was a condition that was dangerous, as I believed at the time, to Mr. Reed. The amount was called a bonus in the different dealings between the parties to cover up the situation from other people who had expended money the same as Metcalf, Fink and Curtze, and to prevent the knowledge that there had been a settlement or adjustment with them, and because Mr. Reed did not want Mrs. Shatto to know that he had made a settlement with Fink, Metcalf and Curtze. No part of the \$20,000 promised to be paid

by Reed to Fink, Metcalf and Curtze is included in the mortgage."

This testimony of Rosenzweig is corroborated by Curtze, Metcalf, Conrad and Fink, and is no doubt a true statement of the actual facts. Reed has a different version of the affair, and tries to make it appear that the \$20,000 and the one-tenth interest in the property were given and received as a premium for making the loan; but his testimony is halting and evasive, and is not sufficient to overcome that of the plaintiffs. The reference to the matter as a bonus in the statement of Reed to his creditors in the bankruptcy proceeding and in the other transactions between the parties was, as Mr. Rosenzweig stated, for the purpose of keeping the knowledge of the true situation of Reed's affairs from the creditors similarly situated. The transaction by which it is alleged the plaintiffs acquired a one-tenth interest in the mortgaged property and a promise for the payment of \$20,000 in cash when realized from the property was merely the result of an adjustment between Curtze, Fink and Metcalf on the one hand and Reed on the other of an alleged loss sustained by the former in some previous financial venture with Reed, and had no connection whatever with the loan. At the time of this settlement Reed had no title to the property. Everything was contingent upon the result of the suit then pending in the federal court. The ownership of the property was in the original parties, subject to the options of the mining company to purchase it. To meet these options, large amounts of money were required, which Reed was having difficulty in securing. To have Metcalf, Fink and Curtze intervene in the suit then pending in the federal court, as they were threatening to do, and attempt to assert their claims, would have complicated matters, and increased the difficulty of Reed's carrying out his plans. To adjust these claims and prevent such a complication, and to secure the services of Mr. Rosenzweig, who seems to have been the attorney for large moneyed interests, was the motive for the settlement. It took place more than a year before the mortgage in suit was made, and had no connection whatever with such mortgage. The \$20,000 agreed to be paid by Reed to Metcalf, Fink and Curtze has never been paid. It was not included in the mortgage, but

is a separate and distinct transaction. When it became apparent that Reed would lose the property and Metcalf, Fink and Curtze get nothing on their settlement unless he could raise money sufficient to pay the balance due on his bids and the expenses of the receivership, Fink, Curtze and Metcalf agreed with their co-plaintiffs that if they would join them in raising money with which to clear the title they would divide the amount coming to them under the settlement with Reed. This arrangement was entirely between them. Reed had nothing to do with it, and had no interest in it. The amount thus agreed to be divided was not paid or received from Reed as a consideration for the loan, nor for the purpose of avoiding the usury law. Assuming, therefore, that the defendants in this suit are in a position to make the defense of usury, we are satisfied that it is not sustained by the testimony.

4. The point that the mortgage is for more than was actually due plaintiffs is based on the contention that a part of the receiver's certificates turned in as cash on the bids of Reed and Warner for the mining and railway properties and included in the mortgage were held by the plaintiff Curtze as collateral security for a loan made by him to Reed, and should not have been included in the mortgage. There were three lots of certificates surrendered to the federal court for cancellation by Mr. Rosenzweig at the time the property was taken from the hands of the receiver—one for \$8,500, one for \$4,912.50, and one for \$26,445—which, with accrued interest, amounted in the aggregate to \$46,188.96. The first lot was sold by the receiver directly to Curtze, and was, of course, his property. The second was sold by the receiver to the Erie Dime Savings & Trust Co., and was its property. The third was issued originally to Reed, and was deposited by him with Curtze as collateral security for money advanced from time to time. On October 15, 1901, the amount of the loan being in excess of the face of the certificates, Reed sold and transferred the certificates in writing to Curtze absolutely, and with the right "to collect the entire amounts for his own use and benefit." Since that time the certificates have in all the dealings of the parties been considered, treated and deemed as the property of Curtze, and no question has been raised in

reference thereto by Reed, or any one else, until this suit was commenced.

The decree should be affirmed.

AFFIRMED.

Argued 14 February, decided 10 April, 1905.

RYAN v. GALVIN.

80 Pac. 421.

COSTS IN EQUITY CASES ARE DISCRETIONARY.
Under Section 566, B. & C. Comp., the allowance of costs and disbursements in equity cases on appeal is discretionary.

From Multnomah: **MELVIN C. GEORGE**, Judge.

Suit by Matthew Ryan against Michael and Ellen Galvin, resulting in a decree, from which defendants appeal.

AFFIRMED.

For appellants there was a brief with an oral argument by *Mr. James Hennessy Murphy* and *Mr. Frank Schlegel*.

For respondent there was a brief and an oral argument by *Mr. James Gleason*.

PER CURIAM. On August 11, 1902, the plaintiff on one part, and the defendants on the other, entered into a written contract, whereby the defendants, in consideration that the plaintiff would execute and deliver to them his deed to lot 8, in block 18, in the City of Portland, Oregon, the same not to become effective until his death, agreed to provide for plaintiff a home with them during his life, to furnish him board, lodging, and comfortable clothing, to do his washing and mending whenever required by him, and when dead, to see that he was given a Christian burial; also to erect within five years a monument to the memory of Ellen Ryan, the deceased wife of plaintiff, at a cost of \$300, and place about it an artificial stone coping at an additional cost not to exceed \$30; but it was stipulated that in case the plaintiff was able to work or could obtain the money, then that he should erect the monument and coping at his own expense. It was further agreed that plaintiff should allow the defendants to occupy the premises designated as No. 356 Sacramento Street, on said lot 8, rent free until his death, when the defendants should become the owners of the entire lot by virtue of the deed aforementioned.

Then follows this stipulation, which very well characterizes the agreement:

"Matthew Ryan, the party of the second part, wants the parties of the first part to act as his custodians of his money, rents, or money he may earn by work, when he wants to give Mrs. Ellen Galvin his money to keep for him; but he should always like to have given to him a dollar or so when he needs it. The rent of house No. 354 Sacramento Street he will collect himself, and he wants the privilege of working at any work he may get and collecting his own wages. He also agrees to pay the taxes on the two houses and lot 8 in block 18, and the insurance on the houses while he has an income; but should he fail to have an income by rent or work, the parties of the first part will have to pay taxes and insurance rates."

The deed to the lot was executed and delivered by Ryan to the defendants concurrently with the signing of the contract. It is in the usual form of a warranty deed, except that it contains a provision that it shall not operate to take effect until after the death of the plaintiff. The purpose of the present suit is to obtain a cancellation of both these instruments, on the ground of a failure on the part of defendants to observe the conditions of the contract in furnishing plaintiff with a home, board, etc. A brief narrative of the events leading up to the negotiations and of those which followed will sufficiently indicate the situation.

The plaintiff is a laboring man about 57 years of age, illiterate, and without business experience. He accumulated the means with which to purchase the property in question from wages earned at common labor, such as hod carrying, digging, shoveling, and the like and it cost him in the neighborhood of \$1,800. After the death of his wife, which occurred about the first of the year 1902, he made his home with a neighbor, but, owing to some trouble in the family, he was required to change his place of abode, and then went to live with the defendants, they residing at the time on Grand Avenue. This was about June 21st, and he continued to make his home with them at an agreed rate of four dollars per week for his board and lodging, not including his washing, until August 11th, the date when the agreement was signed. There is some dispute as to whether the negotiations resulting in the present agreement were really

begun before the first arrangement was made for board and lodging, but, however this may be, it is clear that steps were taken by plaintiff prior to its final consummation to have one of his houses vacated, he having two upon the lot in question, so that defendants might occupy it. Provisionary to taking possession, defendants, with the concurrence of plaintiff, built an addition to the house, and made other improvements at large expense, and their subsequent occupancy has been in pursuance of the agreement. Just when this began is not definitely stated, but it must have been before the 1st of September. Under their new relations plaintiff continued with them for nearly 13 months, when he left, and refused further to be bound by the agreement. He complains that after the lapse of some five or six months the defendants began treating him badly, and with contempt and contumely; that they did many things to harass and annoy him, and to make their house disagreeable and unpleasant for him, and manifested such a perversity of disposition towards him as to cause him to feel that it was not at all agreeable to them for him to be about, and eventually compelled him to quit their abode and to seek a home elsewhere. There is pertinent evidence in the record to support this charge. The husband said to him at one time, "You savage, I own that place now; I can do as I like with it"; and spoke harshly to him at other times, while the wife treated him coolly and disdainfully, evincing much displeasure and disgust in having him about. The defendants protest, on the other hand, that they did everything they could within reason to make their home pleasant and agreeable for him, and that they have complied in every particular with their stipulations under the agreement; but that the plaintiff by his own conduct, through hard drinking, has made it difficult to care for him, and that his discontent is the result of his own acts, and not theirs.

With all this, however, one thing is very certain: that is, that the differences between the plaintiff and defendants are wholly irreconcilable, and that plaintiff would not again be content to live with them, whatever they might do for him. The plaintiff further complains that defendants were not to record the deed until his death, but that, in violation of their promise to that

effect, they procured it to be placed on record March 31, 1903. The defendants deny the arrangement, and allege that it was recorded in pursuance of legal advice and for their own protection. We are satisfied from the fact that the deed was not recorded at once upon its execution and delivery that plaintiff's understanding is the correct one. The breach, however, would not alone warrant the relief sought, and only becomes important for consideration in connection with the other matters of misunderstanding between the parties. He also complains that the agreement was not drawn as the parties had previously understood that it should be, but in this he is not sustained by the evidence.

We are impressed that plaintiff's own conduct has had much to do with his discontent, and that he cannot be held blameless for the state of the differences we find existing between him and the defendants; but, while this is true, the defendants have no doubt made their home unpleasant for him both by word and act, and have contributed in no small measure to his dissatisfaction. Perhaps their conduct in that particular, in view of the provocations of the plaintiff, is not sufficient of itself to warrant the relief sought; but in further consideration that he was ignorant and unfamiliar with business affairs; that at the time the contract was entered into he was in distress on account of the recent loss of his wife; that he was apprehensive that he might some time go to the poorhouse; that the contract itself is unusual of its kind, as being made between strangers, without ties of blood or kindred, and is a hard one for the plaintiff—we are impelled to the conclusion that he ought to be permanently relieved of the situation, while at the same time the defendants ought to be placed in statu quo so fully that they shall lose nothing by the unfortunate arrangement. The decree of the circuit court is adequate to the purpose in both particulars, and will therefore be affirmed. Neither party to the appeal is entitled to costs and disbursements in this court. **AFFIRMED.**

Argued 28 June, decided 24 July, 1905.

SEHLBREDE v. STATE LAND BOARD.

81 Pac. 702.

POWER OF STATE LAND BOARD TO WAIVE FORFEITURE.

1. The State Land Board has the power to waive a forfeiture imposed by law for the nonpayment of installments on the purchase price of public land.

PUBLIC LANDS—FORFEITURE UNDER STATUTE OF 1878.

2. Where one, on giving notes for the balance of the price of public lands, receives a certificate of sale, entitling him to a deed on payment of the notes according to their tenor, but containing the provision of Laws 1878, p. 47, that, if any interest on the notes shall remain unpaid for a year after it is due, the certificate shall be void, and all payments shall be forfeited, and the land shall be deemed vacant and shall be subject to sale as if it had not been sold, such a default in payment of interest ipso facto forfeits the contract of purchase and all rights of the purchaser thereunder.

PUBLIC LANDS—WAIVER OF FORFEITURE BY ACT OF 1899.

3. Laws 1899, p. 77, § 5, providing that the holder of a certificate of sale of public lands theretofore issued may pay up arrears of interest within six months of the date of the act, and that all forfeitures of the certificate are suspended for such period, waives a forfeiture of the certificate only so far as one exists at the date of the act for default in payment of interest, and does not waive a forfeiture for default in payment of interest thereafter accruing.

From Marion: REUBEN P. BOISE, Judge.

Statement by MR. JUSTICE BEAN.

This is a mandamus proceeding by C. A. Sehlbrede to compel the State Land Board to issue to plaintiff a deed for state lands alleged to have been purchased by him. On January 3, 1890, he applied to purchase three hundred and twenty acres of school land in Douglas County, deposting with the clerk of the State Land Board, at the time his application was filed, one third the purchase price, and his two promissory notes for the balance, bearing 10 per cent interest, payable semiannually, due, respectively, one and two years from date. His application was approved, and the money and notes accepted on February 20th, in form as made, except that the date of the notes was changed to correspond with the date of the acceptance, and a certificate of sale issued and delivered to him, stating that upon the payment of his notes in full, according to their tenor, he would be entitled to a deed; "but, in case any interest on said notes shall remain unpaid for one year after the same becomes due, then this certificate shall be void, and all payment made thereon shall be forfeited, and the land shall be deemed vacant, and shall be subject to sale as if it had not before been sold." On August

20, 1891, interest was paid on both of the notes, and on February 16, 1892, the note first maturing was paid, and the interest on the other. On April 13, 1899, interest was paid to date and accepted on the outstanding note, but no further payments have been made thereon. On September 9, 1902, plaintiff tendered the balance due, and demanded a deed, but the board refused to accept the money or make the conveyance, and hence this action. A demurrer to the alternative writ was sustained by the court below, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Charles A. Sehlbrede, James Corwin Fullerton, George S. Downing and Ossian Franklin Paxton*, with oral arguments by *Mr. Sehlbrede*, in pro. per., *Mr. Paxton* and *Mr. Fullerton*.

For respondent there was a brief and an oral argument by *Mr. Andrew Murray Crawford*, Attorney General.

MR. JUSTICE BEAN delivered the opinion of the court.

1. The law under which the sale of state lands was made at the time plaintiff's application to purchase was accepted and the certificate issued to him provided that upon the payment by an applicant of one third of the purchase price of the land applied for, and the execution of his promissory notes, due in one and two years, respectively, and bearing 10 per cent interest, for the remainder, he should be entitled to a certificate from the board that he had purchased the land, paid a certain sum thereon, executed his promissory notes for the balance, and on the payment of such notes would be entitled to a deed, and declares that "if any interest should remain unpaid on any note or notes given for part of the purchase price of lands for one year after the same becomes due, the sale and certificate shall be void, and all payments thereon shall be forfeited, and the land shall be deemed vacant, and shall be subject to sale as if it had not before been sold": Laws 1878, p. 47. This law was amended or superseded by the act of 1899 (Laws 1899, p. 160, § 14), which, however, makes no material change in this regard, except to provide that the sale and certificate shall be void if any installment of principal, as well as interest, shall remain unpaid for the time stated.

Construing this and a similar statutory provision and contracts made by virtue thereof, the court has held that the time of payment of interest on the deferred payments on contracts for the purchase of state lands made prior to 1899, and on both principal and interest on contracts made since that time, is of the essence of the contract, and a failure to make any such payments within the time specified in the statute operates ipso facto to forfeit the contract and all rights of the purchaser thereunder, without any action of the State or its officers, or judicial decision to that effect, but that, like all contracts for the sale of land containing a similar stipulation, it may be waived by the vendor, and that the State Land Board has authority, by virtue of its power to make rules and regulations for the transaction of its business, etc., to act for and bind the State by such waiver: *Miller v. Wattier*, 44 Or. 347 (75 Pac. 209); *Robertson v. Low*, 44 Or. 587 (77 Pac. 744).

2. The soundness of these decisions is questioned by counsel for plaintiff, and we are asked to review the grounds upon which they rest. This we have done, but without changing or modifying our opinion. The land offered for sale belonged to the State. It had a right to sell it upon such terms and conditions as it might deem advantageous. No one was compelled to accept its terms, or to make a purchase unless he desired to do so; and, if he did, his act was voluntary, and he cannot complain of the conditions imposed. Whether the transaction, where the purchase price is not paid in full and the deed executed at the time of the purchase, is to be considered as a sale, or a mere executory contract for a sale, is immaterial, so far as any question now before us is concerned. In such case no title to the land passes from the State; and the contract is made, and the certificate of sale issued, upon the express condition that the sale and certificate will become void, and all rights or interests of the purchaser thereunder be forfeited, by a failure to make the deferred payments in accordance with the law. The statute in this regard is to us plain, and the legislative purpose apparent. There is really no room for construction. Indeed, language could scarcely have been selected more clearly expressing the legislative intent, at the time the plaintiff's contract was made, to make the time

of the payment of the interest on the deferred installments of the purchase price, and, since 1899, to make the payment both of principal and interest, of the essence of the contract for the sale of state lands, and to forfeit such contracts and all rights and interests of the purchasers thereunder in case of the failure to make such payments within the time provided in the statute. The provision that in default of payment for one year after the same becomes due the sale and certificate shall become void, all payments forfeited, and the land vacant and subject to sale as if it had not been before sold, is, by virtue of the law authorizing the sale itself, a part of the contract, and it is just as valid and binding as similar provisions in contracts between individuals, and it should be given exactly the same force and effect. The decisions heretofore made are but applications to this class of contracts of the general rules governing ordinary contracts for the sale of land containing such provisions. The full and complete discussion of the question in the recent case of *Maffet v. Oregon & Cal. R. Co.* 46 Or. 443 (80 Pac. 489), renders needless its further consideration at this time.

3. At the time the plaintiff tendered the balance due on his contract and demanded a deed, he was about three and one half years in default with the payments of his interest, and therefore his rights under the law and his contract were forfeited, and the contract itself was void and of no effect, unless the default had in some manner been waived or excused. It is not averred or claimed that there was any express waiver, but it is argued that the time essence stipulation was impliedly waived by the receipt and acceptance of payments of principal and interest. No payment of either interest or principal was received or accepted by the land board from the plaintiff after his contract had by its terms become forfeited, except the one made on April 13, 1899. The payments of August 20, 1891, and of February 16, 1892, were all made within the time specified in the statute, and within one year after the same became due. The payment of April 13, 1899, was received and accepted by the board, not of its own motion, but in pursuance of the provisions of Section 5 of the act of 1899 (Laws 1899, p. 77), which reads as follows: "The holder of any certificate of sale heretofore issued, desiring to

pay up all arrears of interest at the rate of 6 per cent per annum, shall be entitled to do so, provided said arrears of interest, and so much of the principal as shall leave only one third of the purchase price unpaid, shall be paid to the State Land Board within six months from date on which this act goes into effect, and all forfeiture of such certificates of sale is suspended for said period. In case the holder of such certificate of sale shall make the payments herein provided, his note for the remaining one third of the purchase price shall bear interest at 6 per cent and, in case the interest is paid promptly, shall be permitted to stand until demand is made by the board."

An intention to waive the time essence stipulation in the contract cannot, therefore, be implied from the course of dealing between the parties, or from the action of the land board in receiving and accepting payments on the contract after forfeiture had accrued. Nor did the act of 1899 amount to a waiver of such stipulation, or a modification of the contract, so far as future payments of interest were concerned. It was a mere legislative offer to the purchasers of state lands who were in arrears in the payment of interest to waive such forfeiture and accept payment of such arrearage at the rate of 6 per cent per annum, provided it, together with so much of the purchase price as would leave only one third remaining, should be made within six months; and in case of such payment it was provided that the remainder of the purchase price should bear interest at the rate of 6 per cent per annum, and "in case the interest is paid promptly" should be permitted to stand until demanded by the board. It made no change or modification in existing contracts, or the law under which they were made, as to the time of payment of interest in the future, or the effect of a failure to make such payment within the stipulated time after it becomes due. It left the original contracts in full force and effect, except it gave the purchasers who were in default an option to reinstate themselves, and generously offered to permit them to do so by paying 6 per cent interest, rather than that stipulated in their contracts, provided it was made within a certain time. It may be that under the act no forfeiture would accrue for a failure to pay the principal, unless its payment was first demanded by the

state board; but it expressly provides that the interest must be paid "promptly" as stipulated, and that the payment of principal shall be deferred, if at all, only on condition that the interest is so paid. So that we do not think the plaintiff's rights, so far as the future payment of interest is concerned, were at all changed by the act of 1899, except it was reduced from 10 to 6 per cent. It was still obligatory on him to make the payments promptly, in order to save the forfeiture of his contract. This he did not do, but allowed the matter to run along for more than three years. Under the law and the terms of his contract, the court is powerless to relieve him from the consequences of his default, assuming for the purposes of this case, but without deciding, that mandamus will lie to compel the State Land Board to issue a deed or patent, and deliver it to a purchaser of state lands who has complied with his contract.

Judgment affirmed.

AFFIRMED.

NOTE.—On December 4, 1905, a rehearing was denied in this case, the affirmance to be without prejudice to further proceedings. REPORTER.

Argued 6 July, decided 31 July, 1905.

STATE v. REA.

81 Pac. 822.

CRIMINAL LAW—EVIDENCE OF OTHER CRIMES.

1. Evidence otherwise competent should not be excluded because it may incidentally tend to connect defendant with other offenses than the one for which he is on trial, though the prosecution should not be allowed to directly show that defendant has committed other crimes not connected with the one under consideration.

For example: Where, in a prosecution for horse theft, defendant R. offered evidence that M. gave him a certain sorrel colt two years before, and that one of the horses alleged to have been stolen and sold was the colt in question; that M. used a "JL" brand on the left shoulder, but thereafter changed the brand to "JL" with a bar, and used it on the stiffler, evidence of another that he knew the bay mare that defendant claimed to have gotten from M., and that it was not the same mare that defendant sold; and that she was branded with "JL" on the right shoulder, and that the brand which M. used for his own animals was placed on the left shoulder, and was then "JL" with a bar, while the brand on such bay mare was "JL" without the bar on the right shoulder—was not objectionable in rebuttal, though it also tended to show that defendant had committed an independent crime.

MISCONDUCT OF JUROR AS GROUND FOR NEW TRIAL.

2. The weight of the testimony in this case shows that the remarks attributed to the prosecuting witness were made by another person, and that the juror did not hear them at all, so manifestly there was neither misconduct by the juror nor any attempt to influence the jury.

From Morrow: WILLIAM R. ELLIS, Judge.

Albert H. Rea and Charles Matteson were convicted of horse stealing and appeal. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600. **AFFIRMED.**

For appellants there was a brief over the name of *Bennett & Sinnott*.

For the State there was a brief over the name of *Gilbert Walter Phelps*, District Attorney.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

An information having been filed charging the defendants with the larceny of one mare, the property of W. E. Royse, and one mare and two colts, the property of J. M. Humphrey, a conviction was had and judgment ensued from which defendants appeal.

1. The two mares, one being a sorrel and the other a bay, were branded with an "H" on the left stifle or hip, and with a secret brand with the same initial on the inside of the right leg. This was Humphrey's brand, but the defendant Rea used an "H" brand at the time. The animals were driven from the ranch in Morrow County to Grant County and sold by the defendants. The defendants offered evidence tending to show that one Morrow gave the defendant Rea a sorrel colt, a yearling past or two years old, that had a cut or scar on the fore foot made by a wire, and at another time gave him a bay colt. There is uncertainty in the testimony as to the time when this last transaction took place. Rea took possession of Morrow's ranch as foreman in September, 1898, and, together with his wife, occupied it in that capacity for about two years. Prior to that time Rea was in the employ of Morrow, taking care of his sheep, and was about the ranch where the horses ranged more or less. Morrow testified that Rea came into his office, which was adjoining the hotel, and said that there was a "nice bay colt out there," and asked witness to give it to him, and that witness was satisfied to let him have it. Morrow was unable to fix the date of this transaction, and it is only by relation to the time that he was in the hotel business that he could speak as to the matter. He finally concluded that

it was not until 1899 that he took charge of the hotel, although his first impression was that it was in 1898. He further described the colt when given as a "nice little colt," although he says he never saw it. Morrow used a "JL" brand on the left shoulder for a time, but, on finding that another party used the same brand, he changed to "JL" with a bar and used it on the stifle. Mrs. Rea testified that Rea had the colt at the ranch while they occupied it.

In this condition of the record, the State called N. H. Leathers, who was asked, in substance, to state whether or not he knew the bay mare or filly that defendant claimed to have gotten from Morrow during the time that he was upon his ranch, to which he answered in the affirmative. He further answered that it was not the same mare that defendants sold at Sumpter, and that she was branded with "JL" on the right shoulder. On cross-examination he further testified that it was some time in the summer of 1898 that he was looking for the animal, that she was a yearling past then, and that Matthews was on the ranch; he being foreman for Morrow, whom Rea succeeded. Witness could not say, however, whether Rea was living there at the time or not. In further examination the witness stated that the brand which Morrow used for his own animals was placed on the left stifle, and was then "JL" with a bar across the initials; that the brand upon the filly was "JL" without the bar on the right shoulder; and that he was looking for the individual filly with the "JL" on her.

Now, it is insisted on the part of the defense that this testimony of Leathers was not properly in rebuttal, and that it was injurious to defendants' case, as it tended to prejudice Rea and the defendants' witnesses in the minds of the jury, by carrying with it inferentially the implication that he or the witnesses had committed an offense other than the one with which the defendants were charged. As a general rule, evidence of an independent crime and matters connected therewith, altogether disconnected with the crime under investigation, which throws no light on the alleged criminal transaction, is to be excluded, as its only tendency could be to distract the attention of the jury from the real issues in the cause and superinduce prejudice against the

accused: *State v. Parker*, 96 Mo. 389 (9 S. W. 728); *Boyd v. United States*, 142 U. S. 450 (12 Sup. Ct. 292, 35 L. Ed. 1077); *Ogle v. Brooks*, 87 Ind. 600 (44 Am. Rep. 778). The purpose the State had in view in offering the testimony of Leathers was to rebut the inference deducible from the testimony of Morrow and Mrs. Rea, when connected with the State's testimony, that the bay mare driven away and sold by the defendants was the bay colt that Morrow gave to Rea. Manifestly such was its effect. It is argued that, under the evidence, the bay filly that Leathers referred to could not have been the same bay mare which the defendants are charged with stealing, and which their witnesses left one to infer was the bay colt grown up that Morrow gave to Rea, because it is said the bay colt was given to Rea in 1899, when it was a little colt, and it was in 1898 that Leathers was in search of the filly. It may be remarked as to this that there is much uncertainty as to the dates, and a great deal of uncertainty as to the age of the colt when given to Rea. But, however this may be, it is not shown that Morrow gave Rea more than one bay colt, and, it being an unusual transaction, the strong inference would be that he gave but one. Now, if Rea was claiming another colt of the same color as being the one that Morrow gave him, and it would seem that he was from the brands, it would undoubtedly weaken his claim that the animal in question was that particular colt. In this view of the matter, the testimony was competent. It is not unusual for persons charged with theft to attempt to account for the property found in their possession, and, if they claim ownership, any inconsistent claim of ownership that they may have made would be relevant to rebut their present claim. The rebuttal testimony of Leathers has such a tendency to discredit Rea's present claim of ownership of the bay mare. The testimony does leave the impression that the defendant Rea was claiming an animal not his own, which was branded in an unusual way, thus casting a grave suspicion upon his motive and demeanor; but, so long as the evidence was relevant and pertinent for the essential purpose, it is admissible, although it does tend to substantiate the commission of another and independent crime. The objection is, therefore, not well taken.

2. Another error is assigned relative to a motion made by defendants while the trial was in progress to discharge the jury because of the misconduct of Bengé, one of the jurors. From the record we gather that the jury was allowed to separate, and the particular complaint is that W. E. Royse, the prosecuting witness, spoke in disparagement of the credibility of two of the defendants' witnesses in the presence of the juror, and that Royse was persistent in hanging about the jurors during the recess or adjournment of the court. The complaint is supported by the affidavits of Rea and his wife and of Otis Stubblefield and his wife. Rea avers that Royse was active and officious in the case; that he was hanging around among the jurors a great deal; that affiant saw him apparently in confidential talk with jurors alone; that he saw him standing immediately in front of Ralph Bengé, and about two feet from him, talking earnestly and excitedly. Mrs. Rea and Mr. and Mrs. Stubblefield corroborate this latter statement, and Stubblefield further avers that he returned and that Royse was talking to Bengé about the case; that he heard Royse say to him that "Bill Ball and Dutton proved Will Morrow a liar," or words to that effect; that Royse further said to the juror, in effect, that Bill Blackwell, another witness for defendants, was not entitled to credit, and that no one paid any attention to him.

Combating the charge, the State filed the affidavits of Royse, Bengé, and Floyd Thomas. Bengé avers that he was in the store of Thompson Bros. on the evening alluded to; that he was talking with Floyd Thomas, a clerk, but that, upon the approach of Royse, he left the store; that he heard no conversation whatever between Thomas and Royse; that no conversation whatever occurred between affiant and Thomas, or in his presence, having relation to the case on trial; and that he carefully refrained from disobeying the instructions of the court to the jurors that they should not suffer any one to talk to them, or in their presence, about the case. Royse avers that he did not make the remarks attributed to him by Stubblefield, but declined to discuss matters connected with the case on the occasion mentioned. Thomas avers that he made the remarks attributed to Royse, but that, if any of the jurors were present when he gave utterance to them,

he was not aware of it, and that he had no such motive as prejudicing the minds of any of the jurors at the time. The trial court, considering these proofs, denied the motion. The decision was in accordance with the preponderance of such proofs, laying out of the case the discretion to be judicially exercised in the premises by the trial court. The juror Bengé, not having heard the offensive utterances attributed to Royse, but probably in fact attributable to Thomas, could not have been influenced thereby. The presumption is that he was not, unless the contrary is shown, or such facts proven that the deduction could reasonably be made. But neither of these conditions has been established.

These considerations affirm the judgment of the circuit court, and such will be the order of this court. AFFIRMED.

Argued 11 July, decided 7 August, modified 23 October, 1905.

STATE v. EDDY.

81 Pac. 941; 82 Pac. 707.

INFORMATION—IDENTIFYING PARTY ACCUSED.

1. Under Section 1306, B. & C. Comp., an information must show with certainty that the person accused committed the offense charged, but it is not necessary to repeat the name; though of course the defendant must be connected by some appropriate words with every act charged.

CERTAINTY AS TO PARTY CHARGED—INFERENCE NOT PERMISSIBLE.

2. While, under B. & C. Comp. § 1316, an indictment need not state presumptions of law, yet inferences, however reasonable, are not permissible to interpret the language of a formal charge where certainty is demanded by statute.

INFORMATION FOR ROBBERY—DEFECTIVE CHARGE OF VIOLENCE.

3. A charge, that certain named defendants unlawfully took sundry coins from a specified person, and "that the said money was then and there unlawfully and feloniously taken from the person of said D. against his will and by violence" is not a charge of the use of violence by the defendants, and the indictment is fatally defective in not charging the defendant with every act necessary to constitute a robbery.

INFORMATION FOR ROBBERY—NAMING OWNER OF STOLEN PROPERTY.

4. It is not necessary under Section 1305, B. & C. Comp., to state in an indictment for robbery the name of the owner of the property taken.

CRIMINAL LAW—APPEAL—FORM OF ORDER ON REVERSAL.

5. Under B. & C. Comp. §§ 1485, 1486, 173 and 1361, relating to appeals and new trials, when a criminal case is reversed for error in considering a demurrer to the information, it is the duty of the supreme court to order a new trial, subject to the discretion of the trial court in resubmitting the case to another grand jury.

From Lane: LAWRENCE T. HARRIS, Judge.

Jesse Eddy appeals from conviction of robbery. REVERSED.

For appellant there was a brief over the names of *George A.*

and *John M. Pipes*, with an oral argument by *Mr. George A. Pipes*.

For the State there was a brief over the names of *George M. Brown*, District Attorney, and *John Monroe Williams*, with an oral argument by *Mr. Andrew Murray Crawford*, Attorney General, and *Mr. Williams*.

MR. JUSTICE MOORE delivered the opinion of the court.

The defendant Jesse Eddy was jointly tried and convicted with James Winkle of the crime of robbery, upon an indictment, the charging part of which is as follows:

"They, the said Jesse Eddy and James Winkle, on the 24th day of February, A. D. 1905, in the County of Lane and the State of Oregon then and there being and then and there acting together, did then and there unlawfully and feloniously take from the person of William Dompire one ten-dollar gold coin, two one-dollar silver coins and four one-half-dollar silver coins, all of the said coins being then and there lawful money of the United States of America, and of the coinage of said nation. That the said money was then and there unlawfully and feloniously taken from the person of the said William Dompire, against his will and by violence to his person and by putting him in fear of force and violence to his person, contrary," etc.

Eddy separately appeals from the judgment rendered against him, his counsel contending that an error was committed by the trial court in overruling a demurrer interposed to the indictment on the grounds that the formal charge did not substantially conform to the requirements of Chapter 8 of Title 18, B. & C. Comp., that more than one crime was charged, and that the facts stated did not constitute a crime.

1. The provisions of our statute relating to the sufficiency of a criminal charge, so far as considered involved herein, are as follows: "The indictment must be direct and certain, as it regards (1) the party charged; (2) the crime charged; and (3) the particular circumstances of the crime charged when they are necessary to constitute a complete crime": B. & C. Comp. § 1306. "The indictment is sufficient if it can be understood therefrom * * (3) that the defendant is named; * * (6) that the act or omission charged as the crime is clearly and distinctly set forth, in ordinary and concise language, without repetition,

and in such a manner as to enable a person of common understanding to know what is intended": B. & C. Comp. § 1314. An indictment or information must be positive in respect to the charge that the person accused committed the act which renders him amenable to the law: 10 Enc. Pl. & Pr. 476. "The indictment," says a text-writer, "must be certain as to the defendant's name": Wharton, Crim. Pl. & Pr. (8 ed.), § 96. "The name," says Mr. Chief Justice JOHNSON in *State v. Hand*, 6 Ark. 165, "should be repeated in every distinct allegation, but it will suffice to mention it once, as the nominative case, in one continuing sentence." It is not necessary, however, that the defendant's name should be constantly repeated in an indictment, if once stated in full, after which specification the name may be abbreviated when it occurs in the same count or sentence, with a reference to the prior statement of it, by the use of the word "said" or "aforesaid": *State v. Coppenburg*, 2 Strob. 273. Thus, if John Smith be charged in an indictment with the commission of a crime, he may thereafter be referred to as "the said John": *Commonwealth v. Hagarman*, 10 Allen, 401.

2. In the case at bar an examination of the last clause of the indictment will show that the defendants' names are not mentioned therein, nor any reference made to them as parties to the action, nor any pronoun used to designate them. It is nowhere directly stated that the violence applied to the person of William Dompire, or the fear induced, to take the money from him, was used or exerted by either of the defendants. It may be inferred, from the statement in the second clause of the indictment "that the said money was then and there unlawfully and feloniously taken from the person of the said William Dompire," that, since it had been charged in the first clause that the defendants "did then and there unlawfully and feloniously take from the person of William Dompire" certain moneys, the defendants were the persons charged with using force and fear to secure the money. It is not necessary to state in an indictment a presumption of law (B. & C. Comp. § 1316), but the rules of criminal pleading forbid that resort should be had to an inference, however reasonable, to interpret the language of a formal charge, where certainty is demanded by statute.

3. The indictment is not specific in respect to the party charged with using the force, which was a particular circumstance of the crime of robbery, and necessary to aver in order to constitute a complete offense.

4. It is argued by defendants' counsel that robbery consists of larceny, aggravated by force or fear, and, this being so, it was necessary to state in the indictment the name of the person who owned the money alleged to have been taken. Our statute prescribing the form of stating the facts constituting robbery is as follows: "Feloniously took a gold watch (or as the case may be) from the person of C. D., and against his will, by violence to his person (or putting him in fear of some immediate injury to his person)": 1 B. & C. Comp. p. 750, form No. 9. The statute declares that the manner of stating the act constituting the crime, as thus recommended, is sufficient in all cases where the forms given are applicable: B. & C. Comp. § 1305. This legislative declaration has been repeatedly upheld in this court: *State v. Dodson*, 4 Or. 64; *State v. Spencer*, 6 Or. 152; *State v. Wintzingerode*, 9 Or. 153; *State v. Ah Lee*, 18 Or. 540 (23 Pac. 424); *State v. Wright*, 19 Or. 258 (24 Pac. 229). In *State v. Dilley*, 15 Or. 70 (13 Pac. 648), the question now presented was decided adversely to appellant's contention; the court holding that, in an indictment for taking money by force from the person of another, it was not necessary, under our statute, to allege that the money taken was the property of another than the defendant. The decision there rendered is controlling in the case at bar.

For the error in overruling the demurrer to the part of the indictment to which attention has been called, the judgment is reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

Decided 23 October, 1905.

ON MOTION TO MODIFY MANDATE.

MR. JUSTICE MOORE delivered the opinion of the court.

5. The judgment in this action having been reversed, the cause was ordered to be remanded for such further proceedings as

might be necessary, not inconsistent with the opinion. The defendant's counsel thereupon interposed a motion to discharge the prisoner, while counsel for the State moved that the cause be remanded for a new trial. The statute regulating the procedure in criminal actions contains the following provisions: "The appellate court may reverse, affirm, or, modify the judgment or order appealed from, and must, if necessary or proper, order a new trial": B. & C. Comp. § 1485. "When a new trial is ordered, it must be directed to be had in the court below; and if a judgment against a defendant is reversed, without ordering a new trial, the appellate court must direct, if he be in custody, that he be discharged therefrom, or if he be admitted to bail, that his bail be exonerated, or if money be deposited instead of bail, that it be refunded to the defendant": B. & C. Comp. § 1486. "A new trial is a re-examination of an issue of fact in the same court after a trial and decision or verdict by a court or jury": B. & C. Comp. § 173. The uniform practice in this court has been in reversing a judgment of conviction for error committed at the trial that did not relate to the sufficiency of an indictment or an information to remand the cause for a new trial; but, when a reversal has been rendered for error committed in overruling a demurrer to an indictment or to an information, it has been customary to remand the cause for such further proceedings as may be proper, not inconsistent with the opinion announced. The trial court, by such latter order, has been enabled, when in its opinion the objection on which the demurrer was allowed could be avoided in a new indictment or an information, to direct the cause to be resubmitted: B. & C. Comp. § 1361. If the definition of a new trial, as hereinbefore quoted, is to be interpreted strictly, it would follow that, when a judgment of conviction is reversed, this court would be powerless to order a re-examination of the issue of fact in the court below, because the foundation for the new trial has been overthrown in determining that the formal charge did not comply with the legal requirements. The inability of this court to order a new trial in such cases might result in discharging a defendant in a criminal action, however guilty he might appear to be, and, possibly, before another indictment could be returned or a new

information filed, it might be difficult again to apprehend such defendant and bring him to trial, assuming that he could be charged a second time for the commission of the same crime without an order submitting the cause. That the legislative assembly never contemplated such possible consequences requires no argument, and, this being so, the definition of a new trial as given by our statute ought to be construed liberally. Such interpretation, except when the objection interposed in and denied by the court below, but sustained by this court, necessarily bars further prosecution of the action, would require the latter court, in every reversal of a judgment of conviction, to order a new trial, if a failure of justice is to be prevented.

The judgments and decrees given by this court must, upon the receipt of a mandate and its entry in the records of the court below, be carried into effect by the latter court, and, when a judgment of conviction is reversed in this court by allowing a demurrer to an indictment or to an information, and a new trial is ordered, it would seem that the lower court, if required to submit the cause to another grand jury or to the district attorney, is necessarily deprived of all discretion, the exercise of which by that court appears to be a condition precedent to the resubmission: B. & C. Comp. § 1361; *Commonwealth v. Swanger*, 108 Ky. 579 (57 S. W. 10). The right to resubmit a cause to a grand jury or to a district attorney after a demurrer to an indictment or to an information has been allowed is vested by statute in the trial court, and its discretion in this respect cannot be controlled by this court or reviewed, except for an abuse thereof. This conclusion discloses the seeming absurdity of ordering a new trial, when a judgment of conviction is reversed by this court because of an error committed by the trial court in overruling a demurrer to an indictment or to an information, for, notwithstanding such order, the latter court, possessing the better knowledge of the case, can exercise its discretion and refuse to make the submission.

As our statute directs that, unless a new trial is ordered by the appellate court, the defendant in a criminal action must be discharged on the reversal of a judgment of conviction (B. & C. Comp. § 1486), we feel compelled, in order to prevent a failure

of justice in the case at bar, to order such a trial, which must, nevertheless, depend upon the discretion of the trial court, so far as it relates to submitting the cause to another grand jury or to the district attorney. The effect of such an order, on reversing a judgment of conviction for error committed in overruling a demurrer to an indictment or to an information, and remanding the cause, is equivalent to a direction to the trial court to sustain the demurrer, and tantamount to sending the cause back for such further proceedings as may be proper, thereby leaving the further prosecution of the action to the discretion of the trial court.

The opinion heretofore announced will therefore be modified, so as to direct a new trial, which is hereby ordered. REVERSED.

Argued 18 October, decided 31 October, 1904.

ALLESINA v. LONDON & LANCASHIRE INS. CO.

ALLESINA v. NORWICH UNION ASSURANCE CO.

78 Pac. 1117.

Appeal from Multnomah County.

These were actions by John Allesina against the above named fire insurance companies on certain policies of insurance. The general history of the cases appears in the report of *Allesina v. London Ins. Co.* 45 Or. 441 (78 Pac. 392). Defendant appealed in each case.

AFFIRMED.

For appellant there was a brief over the names of *Teal & Minor* and *T. C. Van Ness*.

For respondent there was a brief over the name of *Henry E. McGinn*.

PER CURIAM. The above entitled causes were submitted on the argument of the case of *Allesina v. London & Liverpool & Globe Ins. Co.* 45 Or. 441 (78 Pac. 392), and are controlled by the opinion rendered in that case. The judgments are therefore affirmed.

AFFIRMED.

Decided 24 April, 1905.

KRUSE v. HUNT.

KRUSE v. WILLIAMS.

80 Pac. 648.

Appeal from MULTNOMAH COUNTY.

For appellant there was a brief by *Mr. M. L. Pipes* and *Mr. J. F. Logan*.

For respondents there was a brief by *Mr. L. A. McNary*, City Attorney, and *Mr. John P. Kavanaugh*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit by Theodore Kruse, a restaurant keeper, regularly licensed to sell liquors in his place of business, against Chas. H. Hunt, Chief of Police of the City of Portland, and the Mayor and other officers of said city, to enjoin the enforcement of an ordinance prohibiting the sale of spirituous, malt or fermented liquors or wines in less quantities than one quart, to be delivered or used in any side room, back room, upper room or other apartment in the same or an adjoining building. A demurrer to the complaint on the ground that it did not state facts sufficient to entitle plaintiff to the relief demanded having been sustained, the suit was dismissed, and he appeals.

As all the questions presented in the case at bar have been decided adversely to plaintiff's contention in the case of *Sandys v. Williams*, 46 Or. 327 (80 Pac. 642), the decree herein is affirmed.

AFFIRMED.

HANLEY v. KUBLI.

Appeal from Jackson County.

Suit by Mary H. Hanley against Ellen Jane Kubli and another for the admeasurement of dower. There was a decree as prayed for and defendants appeal.

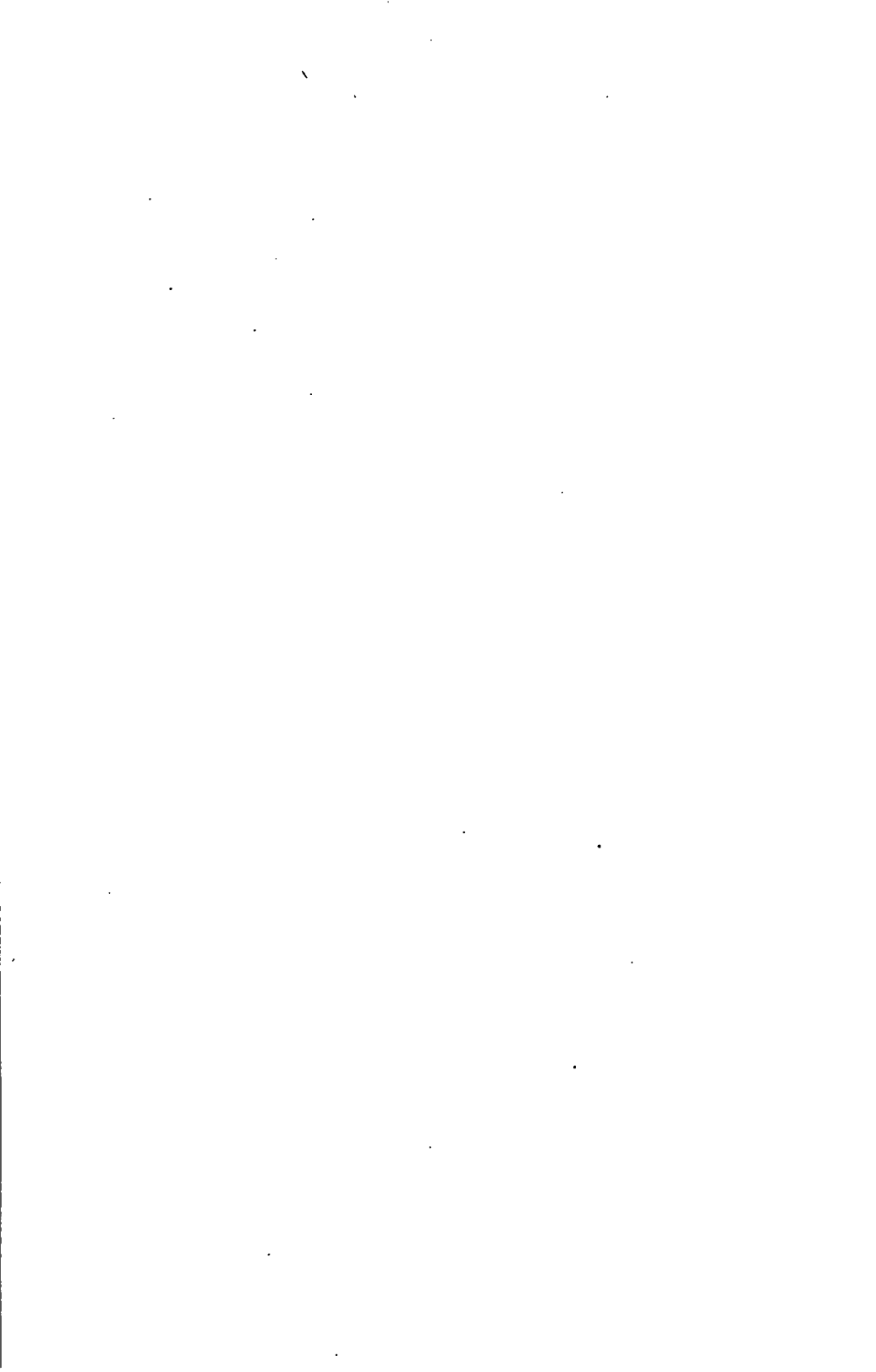
DISMISSED BY STIPULATION.

Mr. Edward Byers Watson for appellants.

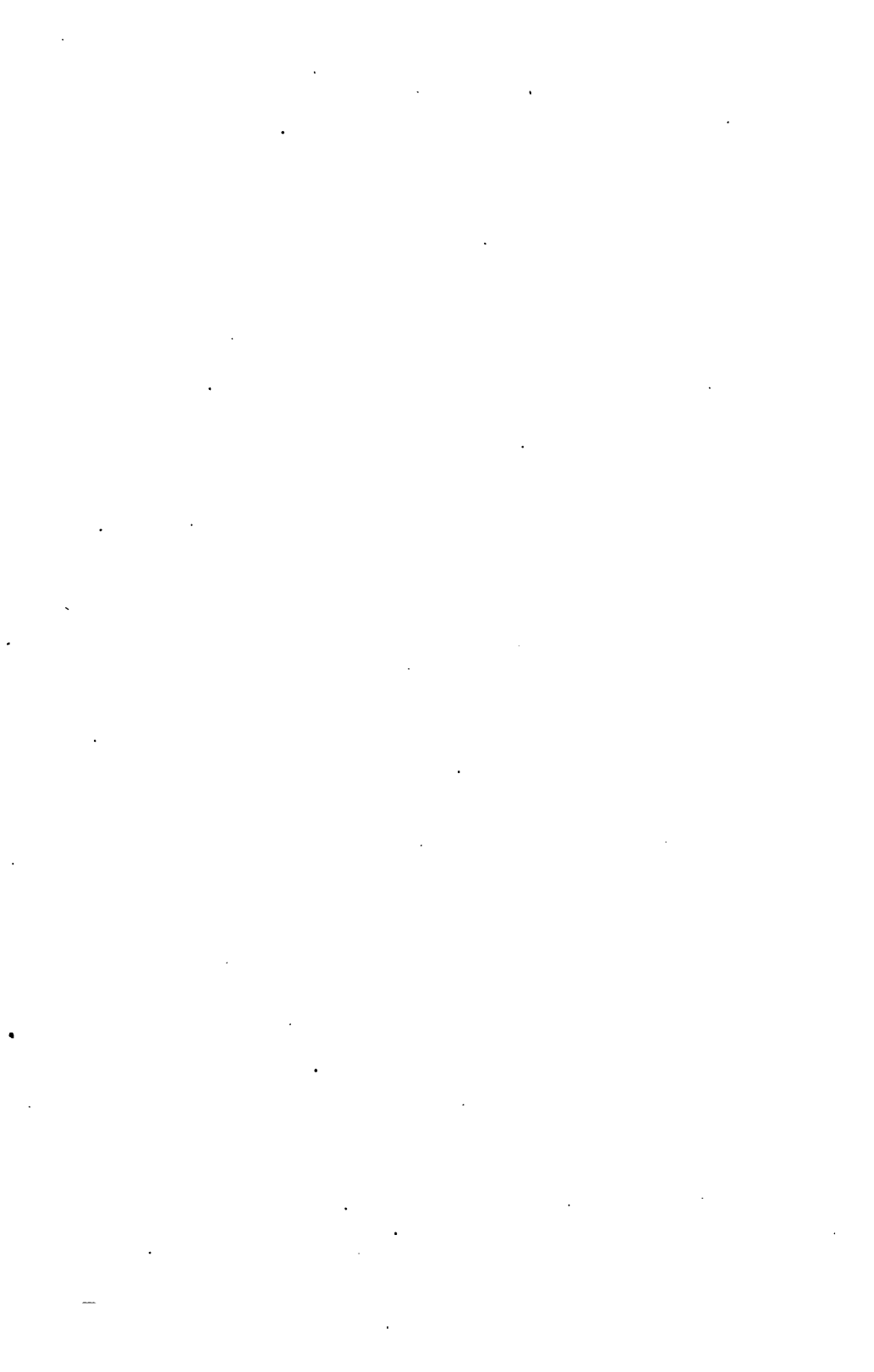
Mr. Allen Evan Reames and *Mr. Clarence L. Reames* for respondent.

After the rendition of an opinion herein, which was unofficially published (74 Pac. 224), a rehearing was granted (75 Pac. 209), pending which the appeal and the suit were dismissed pursuant to the stipulation of the parties. The opinion is, by direction of the court, withheld from publication officially.

DISMISSED BY STIPULATION.



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3. Judgments and decrees, or parts of them, not appealed from are conclusive on all parties, and matters therein decided will not be reviewed on appeal. *Board of Regents v. Hutchinson*, 57.

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5. An objection to an instruction as inapplicable to the case will not be considered where the instruction was favorable to the objecting party. *State v. Gray*, 24.

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6. A bill of exceptions should show the matters objected and excepted to, with so much explanatory statement as may be necessary to show the bearing of the ruling, but the testimony at length should not be attached to the bill of exceptions or referred to in connection with rulings on the introduction of evidence. *Beadle v. Paine*, 424.

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7. An assignment of error that the trial court refused to permit a sufficiently comprehensive cross-examination of appellant's witnesses relative to certain issues tendered by the pleadings, is sufficiently comprehensive, in an action on an official bond, the defense by the sureties being a delivery without authority, to present for review the question whether the bond was so defective on its face as to charge the obligee with knowledge of the actual authority of the principal as to delivery. *Baker County v. Huntington*, 275.

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8. Where it appears that the court has not jurisdiction over a cause, as, because the appeal has been taken from an intermediate order, it should dismiss the proceeding on its own motion, though the objection is not urged. *Thornburg v. Gutridge*, 286.

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9. Where, after verdict, the proofs which are produced for and against the qualifications of a juror are conflicting, and of somewhat even balance, the court's conclusions will not be disturbed unless they may result in manifest injustice. *State v. Louth*, 342.

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10. Error brought about by the conduct of a complaining party is not available; as, where plaintiffs, instead of ignoring matter of inducement in an answer, denied it, any error in admitting evidence tending to prove such matter, because presenting to the jury an immaterial issue, calculated to mislead them, was invited by plaintiff's pleading, and hence is not available error. *Fleishman v. Meyer*, 267.

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11. Under Section 102, B. & C. Comp., it is discretionary to permit or refuse permission to amend a pleading after reversal, and to impose terms or not. *Nye v. Bill Nye Milling Co.* 302.

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14. Under B. & C. Comp. §§ 406 and 555, an equity appeal is tried in the supreme court on the transcript and the evidence, and a decree rendered accordingly, without reference to the findings or conclusions made by the trial court. *Powers v. Powers*, 479.

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15. On appeal the supreme court cannot review questions of fact, but must accept the verdict as conclusive if it is supported by any competent evidence. *Neppach v. Oregon & California Railroad Co.* 374.

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16. Error in excluding evidence is harmless where other equally strong evidence to the same effect is received. *Norwich Insurance Society v. Oregon Railroad Co.* 123.

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17. A witness having answered a leading question that called for information already before the jury, the court properly ordered it stricken out, and even if such an order was error, it was manifestly harmless. *Busch v. Robinson*, 539.

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Moore Mfg. Co. v. Billings, 401.

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Ex Parte Eastham, 475.

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2. Outside of pending litigation, and unless under exceptional circumstances, an attorney has no implied authority to compromise or settle a client's claim.

Fleishman v. Meyer, 267.

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Alden v. Grande Ronde Lumber Co. 593.

BANKRUPTCY.

WHO MAY SUE TO AVOID PREFERENCES BY BANKRUPT.

1. Under the bankruptcy act of 1898 (30 Stat. U. S. 562, c. 541, § 60b), providing for a recovery by the trustee of property given by a bankrupt as a preference, only the trustee can avoid the act and proceed against the one who received the preference.

Lewis v. First National Bank, 182.

IDEM.

2. Under Bankr. Act July 1, 1898, § 70, authorizing the trustee to avoid any transfer of property made by the bankrupt which any creditor might have avoided and to recover the property from the person having it in his possession, the trustee alone, to the exclusion of creditors who have no special lien on the property, can maintain a creditors' bill to set aside a fraudulent transfer of property by the bankrupt.

Moore Mfg. Co. v. Billings, 401.

ESTOPPEL ON CREDITOR TO CLAIM SECURITY.

3. Where a bankrupt pledged a warehouse receipt as security for a note given for money then borrowed, with provision that if such note was not paid at maturity, the pledgee might sell the paper, and, after satisfying

such note, apply the surplus proceeds to prior notes, the pledgee, by filing a claim in the bankruptcy proceedings for the full amount of its claim, without giving any credit thereon for such surplus proceeds, is not estopped to claim the same as security when sued therefor; there having been no fraud, the pledgee having at the time of filing the claim received no money from the pledge, and having, shortly after filing its claim, withdrawn it, and received nothing from the bankrupt's estate.

Lewis v. First National Bank, 182.

CONDUCT AFFIRMING ACT OF BANKRUPT.

4. A bankrupt having within four months of being adjudged a bankrupt pledged a warehouse receipt as security for a note for money then borrowed, with provision that, if the note was not paid at maturity, the creditor might sell the paper, and with the proceeds discharge such note, and credit the surplus on prior notes of the bankrupt to such creditor, and the trustee having sold and assigned the claim for the surplus, and the assignee having sued only for such excess, there was a ratification of the act of the bankrupt.

Lewis v. First National Bank, 182.

EFFECT OF DISCHARGE IN BANKRUPTCY ON RIGHT OF CREDITOR THEREAFTER TO EQUITABLY ENFORCE CLAIM AGAINST HOMESTEAD.

5. After a debtor has been discharged, in bankruptcy, a debt cannot be enforced in equity by a proceeding in rem against the homestead set apart in the proceedings to the bankrupt, though the debt was contracted prior to the adoption of the state homestead exemption act (B. & C. Comp. § 221), which applies only to the enforcement of a judgment obtained on liabilities thereafter contracted, and though a judgment so obtained might have been enforced against such homestead before the debtor's discharge in bankruptcy.

Groves v. Osburn, 173.

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Moore Mfg. Co. v. Billings, 401

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Smith v. Nelson, 1.

BILLS AND NOTES.

INDORSEMENT OF NOTES PAYABLE TO PAYEE BY A FIRM NAME.

1. A note payable to one by a firm or business name may be indorsed by him personally.

Gardner v. Wiley, 96.

NOTES—NEED OF INDORSEMENT BY JOINT PAYEES.

2. Notes payable to more than one payee cannot be assigned except by

the joint action of all the payees, nor can an undivided interest therein be transferred by any one or more payees less than all.

Gardner v. Wiley, 36.

EFFECT OF INDORSING FOR COLLECTION—REAL PARTY IN INTEREST.

3. By indorsing a negotiable note "for collection," or the like, the indorser makes the indorsee his agent with power to proceed in his own name, reserving to himself the beneficial interest and the right to maintain in his own name appropriate proceedings for his own protection, if advisable.

Smith v. Bayer, 143.

INDORSEE AS REAL PARTY IN INTEREST.

4. An indorsee of a negotiable note for collection is the real party in interest in the sense that he may maintain an action on the paper in his own name: B. & C. Comp. § 27.

Smith v. Bayer, 143.

RIGHT OF RESTRICTIVE INDORSEE.

5. Under B. & C. Comp. § 4439, providing that a restrictive indorsement confers on the indorsee the right to receive payment and to bring any action thereon that the indorser could bring, an indorsee of a negotiable note "for collection and return" is entitled to sue thereon in his own name.

Smith v. Bayer, 143.

DEFENSES TO ACTION BY RESTRICTIVE INDORSEE.

6. A restrictive indorsee of a negotiable note takes it subject to all equities that might have been asserted by the maker had it not been indorsed.

Smith v. Bayer, 143.

HOLDER NOT NECESSARILY OWNER.

7. The holder of a negotiable paper is one who has it in possession and is demanding its payment; but such person may or may not be the owner.

Welch v. Kinney, 406.

PAYMENT TO OWNER AFTER INDORSEMENT FOR COLLECTION.

8. In an action in his own name by an indorsee of a note for collection, a payment to the indorser after the assignment of the note, is a good defense, even against a claim of partial beneficial ownership by the indorsee.

Smith v. Bayer, 143.

ACTION BY AGENT AGAINST HIS PRINCIPALS.

9. Where a number of persons not incorporated, and not organized so as to become a legal entity, jointly own a note made by one of them, an agent of them all cannot sue on such note under an assignment for collection, since in such a case the maker would be suing himself through his agent.

Welch v. Kinney, 406.

ACTION—PAROL EVIDENCE TO VARY INDORSEMENT.

10. In an action by an indorsee of a note for collection, parol evidence that plaintiff is the actual owner of two-sevenths of the note is inadmissible as tending to contradict the indorsement, which must control.

Smith v. Bayer, 143.

ACTION—ERASURE IN ADMITTED DOCUMENT.

11. The execution and delivery of an instrument being admitted, its production is unnecessary, and in case it is offered in evidence, an unexplained erasure is immaterial and does not affect its admissibility.

Brown v. Feldwert, 363.

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12. The defense that the consideration for a negotiable note failed is never available against an innocent purchaser.

Brown v. Feldwert, 363.

ACTION—PLEADING—ADMISSION OF NEGOTIABILITY.

13. An admission of the execution and delivery of a promissory note payable to a named person or order is an admission of the negotiability of such paper. *Brown v. Feldwert*, 363.

ACTION—PLEADING—ADMISSION OF OWNERSHIP.

14. An admission that plaintiff acquired a certain note by indorsement and transfer from the payee is an admission of plaintiff's ownership. *Brown v. Feldwert*, 363.

IDEM.

15. In an action on a negotiable note, after the defendant has admitted that the payee, before maturity, indorsed, assigned and delivered the note to plaintiff for value, he cannot deny that plaintiff was an innocent purchaser for value, and plead affirmatively that there was no consideration for the note originally—the admission controls the denials. *Brown v. Feldwert*, 363.

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1. Where the unusual conditions appearing on the face of an official bond are sufficient to excite the suspicion of a reasonably prudent man, the obligee is bound to investigate as to the authority of the principal to deliver the obligation. *Baker County v. Huntington*, 275.

RECORD OF ACTION ON OFFICIAL BOND—EVIDENCE.

2. In the orderly transaction of business there should be a record of the approval, acceptance and disposal of an official bond, but the failure to make such a record does not affect the validity of the obligation where there is an approval and acceptance; and the facts may be shown by the best evidence obtainable. *Baker County v. Huntington*, 275.

BOUNDARIES.

ESTOPPEL BY CONDUCT TO DISPUTE FIXED LINE.

A father, in order to locate the eastern boundary of premises intended to be conveyed by him to his daughter, made certain measurements, pointed out to her the line which he supposed formed the eastern boundary of the land, and executed a deed to her based on such measurements. He thereafter put up a partition fence on the line so located, and in the absence of the daughter again measured the land, selected the site for the house, and superintended its entire construction thereon, she paying part of the cost. *Held*, that the father was estopped to subsequently deny that the line so pointed out and established was the true eastern boundary of the land intended to be conveyed. *Clark v. Hindman*, 67.

See, also *COUNTIES*, 1.

BRIDGES.

INJURY TO TRAVELER OVER COUNTY BRIDGE—ALLEGING KNOWLEDGE OF DEFECTS BY COUNTY OFFICERS.

1. Allegations in a complaint that a stated county, through its agents and officers, allowed the stringers of a certain bridge to become rotten and unsafe by leaving them in the structure many years, that such defective and dangerous condition was well known to defendant county, and that a short time before the accident the county refloored the bridge, using the rotten stringers instead of replacing them with sound ones, are sufficient after verdict, both because it is thereby stated that defendant actually

knew of the real condition of the bridge, and because it is fairly inferable from the facts stated that the defendant knew, or by the exercise of proper diligence could have known, of such condition.

Rice v. Wallowa County, 574.

INJURY TO TRAVELER—SUFFICIENCY OF EVIDENCE.

2. The evidence of the negligence of the county officials in reference to the condition of the bridge in question was ample to go to the jury and to justify a verdict for plaintiff.

Rice v. Wallowa County, 574.

DEFECTIVE BRIDGE—RESULTING INJURY—PLEADING AND PROOF.

3. Though a complaint alleged that an injury to plaintiff resulted from the defective condition of bridge stringers, and made no mention of the condition of the planking, evidence as to the unsound condition of the planking when the bridge was redecked, prior to the accident, was evidentiary matter tending to show with what lack of care defendant maintained the bridge, and, being closely connected with the discovery by defendant's workmen, at the time, of the unsound stringers, could be considered on the question whether defendant had or should have had knowledge of the present condition of the bridge.

Rice v. Wallowa County, 574.

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Powers v. Powers, 479.

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2. A deed from a parent to a child is not void merely because of the relationship of the parties.

Powers v. Powers, 470.

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3. Inadequacy of price, though a badge of fraud, is not alone a ground for setting aside a deed.

Powers v. Powers, 470.

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4. The fact that a deed by a mother to a son was improvidently or unwisely made is not a reason for setting it aside, though it might have some weight in connection with other circumstances.

Powers v. Powers, 470.

CARRIERS.

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1. A passenger who has completed his journey and alighted from the train at the station is allowed a reasonable time to leave the premises, and an intending passenger may occupy the depot waiting-room a reasonable time immediately preceding the arrival of his train, during which he occupies a relation towards the carrier analogous to that of a passenger.

Abbot v. Oregon Railroad Co. 549.

DUTY TO LIGHT STATIONS AND PLATFORMS.

2. A carrier of passengers by rail is bound to exercise reasonable care to keep its platforms, approaches and station grounds, so far as passengers would naturally resort to them, properly lighted at night for a

reasonable time, as determined by the circumstances of the case, the size and importance of the station, and the business done there, next prior to the arrival and immediately following the departure of a passenger train scheduled to stop at the station during the night.

Abbot v. Oregon Railroad Co. 549.

DUTY TO LIGHT STATION PLATFORM FOR SPECIAL PASSENGER.

3. The knowledge of a train dispatcher that passengers arriving on a special train over another road at night intend to take a train on his road does not bind his road to light its depot platform until a reasonable time prior to the arrival of its train.

Abbot v. Oregon Railroad Co. 549.

DUTY TO LIGHT STATION PLATFORM—QUESTION FOR JURY.

4. Whether a given period of time prior to the arrival of a night passenger train was a reasonable period during which the station platform should have been kept lighted is a question for the jury, being one of fact.

Abbot v. Oregon Railroad Co. 549.

RIGHT OF PASSENGER TO LEAVE AND RE-ENTER CONVEYANCE.

5. A passenger may leave the car or boat on which he is traveling to transact his private business at any intermediate station or landing where a stop is made for any reasonable time to receive or discharge passengers, and if he is injured without his fault, in consequence of the carrier's negligence on any part of the premises set apart by it for the use of the public, or so used with its consent, he may recover the damages sustained.

Abbot v. Oregon Railroad Co. 549.

DUTY TO PERSON PERMITTED TO REMAIN IN STATION OR CAR.

6. A carrier owes to one whom it permits to remain in and about its station while waiting for a train not due for some time the same protection and care that is due a passenger, and the same duty exists toward one allowed to remain in a car after arriving at the destination of the train.

Abbot v. Oregon Railroad Co. 549.

RIGHT TO EXERCISE ON DARK PLATFORM—CONTRIBUTORY NEGLIGENCE.

7. A passenger, waiting at a station on a dark night for his train, who is permitted to remain in a well-lighted car provided with necessary conveniences, is guilty of contributory negligence where he leaves the car to walk on the unlighted station platform merely for exercise.

Abbot v. Oregon Railroad Co. 549.

INSTRUCTION AS TO NEGLIGENCE NOT PLEADED.

8. Where the complaint in an action for injuries to a passenger alleged negligence in the operation and management by defendant of its passenger and freight trains, an instruction as to the duty of a carrier of passengers "in keeping its passenger trains and appliances in a safe condition" is erroneous.

Maynard v. Oregon Railroad Co. 15.

CASES IN THE OREGON REPORTS, Approved, Cited, Distinguished and Overruled in this Volume. Same as OREGON CASES.

CAVEAT EMPTOR. See FRAUD, 3.

CHANGING POSITION.

Persons Are Bound by Their Acts When Relied on. See ESTOPPEL, 5.

CHARACTER.

Admissibility of Evidence of Defendant's Character. CRIM. LAW, 5.

CHARGING JURY.

Necessity of Presenting Charges Specially Desired. See TRIAL, 5.

Not Necessary to Repeat Qualifying Terms. See TRIAL, 6.

Entire Charge Must Be Read to Find True Meaning. See TRIAL, 7.
 Instructions Should Cover Only Relevant Matters. See TRIAL, 8.
 Duplication of Charges Is Not Proper Practice. See TRIAL, 9.
 Favorable Charge Not Objectionable Matter. See APPEAL, 5.

CHARTERS OF CITIES.

Construction of Clause Limiting Indebtedness. See MUNIC. CORP. 1.
 Effect of Local Option Act on Right of Cities to Control or Prohibit
 Sales of Liquors. See MUNIC. CORP. 4.
 Power to Make Lawful Pool Room Nuisances. See MUNIC. CORP. 6.
 Portland, 1903, § 73, Subd. 1, 337.
 Subd. 21, 333.
 Subd. 48, 333.

CHILD.

Avoiding Deed by Parent. See PARENT & CHILD.

CHOSE IN ACTION.

Rent Accruing From Land After Execution Sale Is a Chose in Action
 and Not an Appurtenance. See EXECUTION.

CIRCUIT COURT.

Power of to Order Completion of Defective Transcript in Case Appealed
 From Justice's Court. See COURTS, 4.

CITIES. Same as MUNICIPAL CORPORATIONS.

CITY ORDINANCES.

Legality of Ordinance Forbidding Sale of Liquors in Rooms or Boxes
 Connecting With Saloons. See MUNIC. CORP. 5.
 Effect of License of Pool Room. See MUNIC. CORP. 6.

CLAIM AND DELIVERY. Same as REPLEVIN.

CLAIMS.

Estates of Decedents—Right of Assignee of Claims Against Decedent
 to Maintain Suit Thereon. See EX'RS & ADM'RS, 1.
 Estates of Insolvents—Avoiding Preferences. See BANKRUPTCY, 1, 2.
 Insolvent—Enforcement of Claim Against Homestead After a Dis-
 charge by Bankruptcy Court. See BANKRUPTCY, 5.

CLASS LEGISLATION.

Regulation of Liquor Sales—Exception of Hotels. See CONST. LAW, 4.

CLOUD ON TITLE. Same as QUIETING TITLE.

CODE CITATIONS. Same as STATUTES OF OREGON.

COMMENCEMENT OF ACTION. Same as LIMITATION OF ACTIONS.

COMMERCIAL PAPER. Same as BILLS & NOTES.

COMMON CARRIERS. Same as CARRIERS.

COMPROMISE AND SETTLEMENT.

CONSIDERATION FOR COMPROMISE AGREEMENT.

1. Where a genuine dispute exists between parties claiming conflicting
 rights, as, for instance, between a county and a property owner as to the
 validity of certain tax claims and tax sale certificates, a compromise and
 settlement of their respective claims is upon a sufficient consideration.

Multnomah County v. Title Guarantee Co. 523.

FINALITY BETWEEN COMPETENT PARTIES.

2. Where parties not under disability have equal knowledge of the facts,

and are in dispute concerning their respective rights, a compromise settlement is final as to all matters included therein.

Thayer v. Buchanan, 106.

IDEM.

3. A controversy having arisen between plaintiffs and defendants as to the right of the latter to conduct water across plaintiffs' land, and as to whether defendants were using their ditch in a proper manner, a settlement of such dispute, by which defendants agreed to deepen the ditch west of a slough so as to prevent the water from unnecessarily accumulating in the slough, and that in the meantime plaintiffs should be entitled to maintain a drain box for the same purpose, was binding on both parties.

Board of Regents v. Hutchinson, 57.

COUNTIES—VALIDITY OF TAX SETTLEMENTS NOT FRAUDULENT.

4. Where a compromise settlement with a board of county commissioners of sundry taxes and tax certificates in litigation was not fraudulent, the board, if it had the power to make the settlement, cannot rescind it and retain the proceeds after the decree adjudging the certificates valid has become final, though the agreement of compromise included taxes not referred to in the offer to compromise, and the statement as to the amount of taxes was incorrect.

Multnomah County v. Title Guarantee Co. 523.

Right of Attorney to Settle Claim. See ATTORNEY & CLIENT.

CONSIDERATION.

Effect of Failure of on Deed. See DEEDS.

Result of Failure of on Correction of Deed. See REFORM. OF INST.

Failure of—Right to Require Reformation. See SPEC. PERF. 2.

Failure of as Defense to Note—Innocent Purchaser. BILLS & NOTES, 12.

Lack of for Deed—Ground for Setting Aside. See CANCEL. OF INST. 3.

CONSTITUTIONAL LAW.

CONSIDERATION OF CONSTITUTIONAL QUESTIONS.

1. Courts should not pass upon constitutional questions when the case at bar can logically be disposed of on other grounds.

State ex rel. v. Malheur County Court, 519.

PROSECUTION BY INFORMATION IS DUE PROCESS OF LAW.

2. A prosecution for a felony by an information constitutes due process of law as that term is used in the Fourteenth Amendment to the Constitution of the United States.

State v. Guglielmo, 250.

DUE PROCESS OF LAW—NECESSITY OF INDICTMENT—VALIDITY OF ACCUSATION BY INFORMATION WITHOUT GRAND JURY.

3. The statute permitting district attorneys to file informations charging crimes (B. & C. Comp. §§1253-1264), but reserving to circuit judges the discretionary right to call grand juries, is not unconstitutional under Const. U. S. Amend. XIV, prohibiting the deprivation of liberty without due process of law, nor under Const. Or. Art. VII, §18, providing for the selection or abolishment of grand juries.

State v. Guglielmo, 250.

VALIDITY OF EXCEPTIONS IN ORDINANCE REGULATING SALES OF INTOXICATING LIQUORS—SPECIAL PRIVILEGES.

4. An ordinance interdicting the sale of intoxicating liquors in a private room does not, by making an exception in favor of hotels, contravene Const. Or. Art. I, §21, inhibiting laws granting privileges which on the same terms shall not equally belong to all citizens; this not being applicable to a business which may lawfully be prohibited.

Sandys v. Williams, 327.

Providing Special Tax for Court House Bonds. See COUNTIES.

Taking Property for Private Use—Compensation. See EM. DOMAIN.

Special or Local Laws as to Sales of Liquors. See INTOX. LIQUORS. 5.

CONSTITUTION OF OREGON.

Article	I, § 9,	p. 252.
	§ 18,	pp. 243, 247.
	§ 21,	pp. 327, 334, 492, 504.
Article	IV, § 23, Subd. 2,	pp. 492, 503.
Article	VII, § 12,	pp. 233, 235, 241.
	§ 18,	pp. 250, 263, 264.
Article	XI, § 5,	p. 82.
	§ 10,	p. 223.
Article	XV, § 3,	p. 261.
Article	XVIII, § 7,	p. 241.
Bill of Rights,	§ 9,	pp. 251, 256.

CONSTITUTION OF THE UNITED STATES.

Fourth Amendment, pp. 251, 256.

Fourteenth Amendment, pp. 250, 262.

CONTRACTS.

LEGALITY OF CONSIDERATION.

1. A contention that as the arrangement whereby a mortgage was executed was made to avoid the payment of taxes on the mortgage, it constituted a fraud on the public, and that therefore the suit could not be maintained, is untenable, it appearing that the note was taxable; and hence there could have been no avoidance of taxes due the county, even though no taxes were collectible on the mortgage.

Smith v. Nelson, 1.

CONSTRUCTION OF CONTRACT—MEANING OF TERMS.

2. The employment of the word "sell" in the memoranda exchanged during the preliminary discussion of the terms of a contract, which was the result of several conferences and conversations, is not conclusive, as matter of law, as to the nature of the contract.

Pacific Export Co. v. North Pacific Lumber Co. 194.

TERMS OF CONTRACT A JURY QUESTION.

3. Where a contract, as finally developed, was the result of several conferences and conversations, the question as to what the terms were in its final conclusion was properly submitted to the jury.

Pacific Export Co. v. North Pacific Lumber Co. 194.

CONSTRUCTION OF CONTRACT—INDEPENDENT SEPARABLE COVENANTS.

4. Defendant lumber company contracted with plaintiff corporation to subscribe for a certain amount of its capital stock, to be paid for in lumber. Plaintiff agreed to increase its capital stock, to merge its existing business into the new business, to secure land for a lumber yard, to contract with a railway company for the delivery of lumber from a dock, and to secure bona fide subscriptions for a certain amount of its increased capital stock; such subscriptions to be paid in full in from one to four months. Held, that this latter agreement was independent and separable, so that strict performance of it was not a condition precedent to a right to maintain an action for failure of defendant to perform its contract.

Pacific Mill Co. v. Inman, 353.

RESCISSION OF EXECUTED CONTRACT—RETURNING CONSIDERATION.

5. An executed or partly executed contract cannot be rescinded by one of the parties, in the absence of fraud, without returning the considera-

tion, or restoring the other party to his former position. This case illustrates: A property owner having compromised sundry tax disputes with a county by paying a sum of money and dismissing certain suits and appeals, the county cannot rescind the settlement while retaining the money and the advantage of the dismissals.

Multnomah County v. Title Guarantee Co. 523.

PERFORMANCE BY INSTALLMENTS—ACCRUAL OF ACTION.

6. In the case of a contract of sale to be performed by installments, the vendor may sue for any proportionate payment whenever it is due without showing a full performance of the contract.

Barnes v. Leidigh, 43.

IDEM.

7. Where a sawmill owner contracted to sell and deliver the entire output of his mill for a certain period, the delivery, acceptance and payments to be made monthly, the vendor may sue for any installment whenever it is overdue, without reference to the balance of the contract. He need not plead or prove compliance with that part of the contract subsequently to be performed.

Barnes v. Leidigh, 43.

ACT OF GOD AS EXCUSING NONPERFORMANCE OF CONTRACT.

8. The act of God that will excuse the failure to perform a contract must be one that renders performance physically impossible, not merely impossible by the means usually employed. Thus, performance of a contract to deliver chattels at a distant point usually reached by water, yet with a usable land route, is not excused by storms interrupting navigation, for access by land was still available.

Fleishman v. Meyer, 267.

PLEADING PERFORMANCE OF CONTRACT—WAIVER—ALLEGATIONS AND PROOF.

9. In an action to recover for a breach of a contract plaintiff must show whether he relies on a compliance with the contract on his part or on a waiver of compliance by defendant, and whichever is pleaded must be proved, under the rule that allegations and proofs must correspond.

Young v. Stickney, 101.

CONTRIBUTORY NEGLIGENCE. See CARRIERS, 8; MAST. & SERV. 1, 2, CORPORATIONS.

ADMISSION OF GENUINENESS OF STOCK SUBSCRIPTION.

1. Where defendant and plaintiff corporation entered into a contract which, among other things, required plaintiff to increase its stock, and to obtain subscriptions to a part of it, failure of defendant, on receiving a list of the subscribers, to object to a subscription purporting to have been made by a corporation, was an implied admission that the subscription was genuine.

Pacific Mill Co. v. Inman, 353.

DEFENSE TO ACTION OF DAMAGES FOR NOT TAKING SUBSCRIBED STOCK.

2. Where defendant and plaintiff corporation entered into a contract which required plaintiff to increase its capital stock and procure subscriptions for a part thereof, the alleged fact that money paid in by the subscribers to the additional stock issue was not used by plaintiff in accordance with its contract with its stockholders was no defense to an action on the contract of defendant to subscribe to the stock.

Pacific Mill Co. v. Inman, 353.

SERVING PROCESS ON RESIDENT AGENT.

3. Under Section 55, B. & C. Comp., providing for service of process on a resident "agent" of a corporation under some circumstances, service on a nonresident fraternal benefit corporation may be made by delivering the

process to one who, as secretary of the local branch of the organization, is required to receive assessments from members and remit them to the head office, to keep and report the record of the standing of local members, to notify the head office of the death of members and to return the complete proofs of death, such a person being an "agent" of the corporation.

Hildebrand v. United Artisans, 134.

VENUE OF ACTION ON LIFE INSURANCE POLICY.

4. Under a statute providing that a corporation may be sued in the county where the cause of action arose, a life insurance company may be sued on its policy in the county whereof its beneficiary was an inhabitant at the time of his death.

Hildebrand v. United Artisans, 134.

SUFFICIENCY OF RETURN OF SERVICE ON AGENT OF CORPORATION.

5. Where an action has been commenced against a corporation in the county where the cause of action arose, as permitted by Section 55, B. & C. Comp., instead of in the county where the company has its principal place of business, as provided by Section 44, B. & C. Comp., the return on the summons must show that service was made on one of the principal officers of the corporation, or state on what clerk or agent it was served, and the reason for such substituted service.

Hildebrand v. United Artisans, 134.

NECESSITY OF SHOWING WHERE CAUSE OF ACTION AROSE.

6. In order to confer jurisdiction over a corporation that has been sued in a county other than the one in which its principal office is situated, the record must show somewhere that the cause of action arose in the county of the venue.

Hildebrand v. United Artisans, 134.

IDEM.

7. A life insurance corporation of M. county having been sued in D. county on one of its policies, a statement in the record that the company "executed and delivered" its policy in D. county, and that the same was accepted in that county, does not show that the assured died there, and thus it does not appear that the cause of action arose in the county of the venue.

Hildebrand v. United Artisans, 134.

CONSTRUCTION OF VOTING TRUST CONTRACT.

8. A corporation was organized to purchase certain mining and railroad property subject to a mortgage, which the corporation assumed. A voting trust agreement was executed, which stipulated that 395,000 shares of the corporation's stock should be issued to one of the mortgagees as trustee, and that such shares should be voted by him for such directors as the trustee and certain others should jointly direct, and that the trustee or his successor should not vote to sell below par any of the 100,000 shares of the particular stock remaining in the treasury, and none of the parties should sell any of the shares held in trust without the written consent of the others until August 1, 1905, unless the mortgage and liens on the property should be sooner paid, and the treasury stock sold and paid for. The first draft of the trust agreement contained a provision extending the time for payment of the mortgage, but this was eliminated. *Held*, that such trust agreement did not effect an extension of the mortgage until the date specified for the termination of the trust.

Curtze v. Iron Dyke Mining Co. 601.

See, also, INTOXICATING LIQUORS, MUNICIPAL CORPORATIONS, STATUTES.

CORPUS DELICTI.

Certainty of Proof of Offense Required to Convict. See HOMICIDE, 5.

COSTS.

COSTS IN EQUITY CASES ARE DISCRETIONARY.

Under Section 566, B. & C. Comp., the allowance of costs and disbursements in equity cases on appeal is discretionary. *Ryan v. Galvin*, 611.

Effect of Premature Filing on Right to New Trial. See **NEW TRIAL**, 3.

Failure to Serve Cost Bill—Remedy by Motion. See **APPEAL**, 18.

Fees of Receiver's Attorney as Disbursements. See **RECEIVERS**, 1.

COUNTIES.

EFFECT OF STATUTES CHANGING BOUNDARIES OF COUNTIES.

1. Hill's Ann. Laws 1887, § 2251, established the boundaries of C. county, and by Laws 1898, p. 27, an independent act, defining the boundaries of W. county, was amended, detaching a strip of territory from the southwest corner of C. county, and attaching it to W. county, and providing for recording in the latter county certified copies of C. county records affecting real estate so transferred. By Laws 1901, p. 126, Section 2251 was amended so as to change the boundaries of C. county, and include therein at the southeast corner a small section of territory theretofore not included in any county, the amendment being effected merely by a restatement or republication of such section as it existed prior to the act of 1898, only altered to include the additional territory. *Held*, that such amendment did not repeal Laws 1898, p. 27, so as to return to C. county the strip thereby attached to W. county.

Allison v. Hatton, 370.

CONTRACT CREATING A DEBT.

2. A contract by a county for the construction of a court house by which the county agrees to issue warrants to the contractors to the amount of the contract price, payable only out of a fund to be created by levying a special tax for a series of years, creates a debt against the county, within the meaning of Const. Or. Art XI, § 10, limiting the power of counties to "create any debts or liabilities" exceeding a stated amount.

Brix v. Clatsop County, 223.

CONSTITUTIONAL LIMIT ON DEBTS.

3. A distinction exists between the restriction of a constitution prohibiting a municipality from "creating" an indebtedness in excess of a stated amount and one providing that the indebtedness "must never exceed" a stated amount, the latter not admitting of any exceptions except liabilities arising from tort.

Brockway v. Roseburg, 77.

POWER OF COUNTY COURT TO COMPEL SUPPORT OF PAUPER RELATIVES.

4. Under Sections 2653 and 2654, B. & C. Comp., providing that county courts shall have superintendence of the poor, and that poor persons must be supported by their relatives, if the latter have the financial ability, the county court must hold a hearing, upon notice, as to the conditions and causes involved, and if it then appears that the relatives ought to contribute to the support of the poor person, the court may enter an order directing the relatives to contribute. If this order is not obeyed, or the sum contributed is not sufficient, the county may maintain an action to recover a reasonable sum for the care of the poor person, but it cannot itself compel payment of any sum.

Faling v. Multnomah County, 460.

POWER OF COUNTY COMMISSIONERS TO SETTLE LITIGATION.

5. Under B. & C. Comp. §§ 912, 913, 2518, authorizing suits against a county, conferring power on the county commissioners in relation thereto, and permitting them to release any debt or damages arising out of contracts due the county, on such terms as may be just, the county commissioners can settle pending controversies as to the validity of tax

certificates held by the county, and the rights of the respective parties thereunder.

Multnomah County v. Title Guarantee Co. 523.

IDEM.

6. Section 912 of B. & C. Comp., subd. 10, authorizing the county court to release any debt or damages arising out of a contract due the county, does not preclude the county court from the settlement of controversies arising in other ways, under the rule that expression of one power excludes all others, since other sections of the statutes make it evident that no such intention existed.

Multnomah County v. Title Guarantee Co. 523.

IDEM.

7. In settling disputes concerning taxes and tax sale certificates county commissioners act as fiscal agents of their county, and both they and the county are subject to the usual rules between principal and agent.

Multnomah County v. Title Guarantee Co. 523.

ACTION AGAINST COUNTY FOR FEES.

8. Where an officer's fees are regulated by law, and he has performed the services entitling him thereto, the county court must audit and allow his claim, and on refusal to do so an action at law may be maintained against the county to recover the sum due.

Wallowa County v. Oakes, 33.

COUNTY COURTS.

Jurisdiction of in Probate—Amount Involved. See **COURTS**, 1.

Proceedings in Consideration of Rejected Claims. See **COURTS**, 2, 3.

Limitation on Right to Sue—Rejected Claim. See **LIM. OF ACTIONS**, 3.

Compelling Support of Pauper Relatives. See **COUNTIES**, 4.

COUNTY ROADS. Same as **HIGHWAYS**.

COURTS.

JURISDICTION OF COUNTY COURTS IN PROBATE MATTERS.

1. Under Const. Or. Art. VII. § 12, conferring on county courts "the jurisdiction pertaining to probate courts, * * and such civil jurisdiction as may be provided by statute not exceeding five hundred dollars," the county courts of this State are not limited in the examination and allowance of claims against estates to claims of that amount when proceeding under Section 1161, B. & C. Comp.

Morgan's Estate, 233.

EXECUTORS—CONSTITUTION—PROBATE JURISDICTION OF COUNTY COURTS.

2. Since the adoption of the Constitution of Oregon, Section 12 of Art. VII of which confers on county courts the "jurisdiction pertaining to probate courts," those courts have had jurisdiction to pass upon the validity of claims presented to but disallowed by executors or administrators. When the constitution was adopted the territorial courts were authorized by statute to settle such claims, and that authority was continued by the clause quoted.

Morgan's Estate, 233.

EXECUTORS—CONSIDERATION BY COUNTY COURTS OF REJECTED CLAIM.

3. Section 1161, B. & C. Comp., is intended to afford a speedy and efficient means of determining the justness of claims against estates after their disallowance by the personal representatives, without the technical pleadings necessary in courts of law, and the proceedings should be equitable rather than legal.

Morgan's Estate, 233.

POWER OF SUPREME COURT TO DIRECT PROPER JUDGMENT.

4. The supreme court cannot amend or correct a sentence, but where

the only error is that an excessive or illegal sentence was imposed, the case may be remanded with direction to impose a sentence within the statute. *State v. Houghton*, 12.

PRACTICE OF SUPREME COURT IN DISPOSING OF CAUSE AFTER AFFIRMING
FINAL ORDER ENTERED ON DEMURRER.

5. After a decision by the supreme court affirming the ruling of the trial court on a demurrer, it is discretionary to affirm the order appealed from, which will end the case, or to remand the cause for further proceedings. *Harding v. Harding*, 178.

JUDICIAL NOTICE OF APPOINTMENT AND POWER OF DEPUTY DISTRICT
ATTORNEY—VERIFICATION OF INFORMATION.

6. Courts will take judicial notice of the appointment and scope of authority of their officers, including deputies. *State v. Guglielmo*, 250.

COURT HOUSE.

Bonds to Build as Creation of Indebtedness. See COUNTIES, 2.

CREDITOR'S BILL.

Lien Acquired by Creditor's Suit After Bankruptcy. See BANKRUPTCY, 6.

CRIMINAL LAW.

JUDICIAL NOTICE OF APPOINTMENT AND POWER OF DEPUTY DISTRICT
ATTORNEY—VERIFICATION OF INFORMATION.

1. Where it appears in a criminal case that the information has been prepared and filed by a deputy district attorney, the court will take notice of the official position of the deputy and of his authority, so that proof is not necessary on either point. *State v. Guglielmo*, 250.

PROOF OF OTHER CRIMES NOT INCIDENTAL TO THE ONE CHARGED.

2. Although proof of the commission of other crimes is sometimes admissible as incidental to the crime charged, it is never allowable to show that defendant has committed, or is said to have committed crimes not connected with the one for which he is on trial. *State v. Lee*, 40; *State v. Rea*, 620.

IDEM—ILLUSTRATION.

3. In a prosecution for larceny of a calf, after a witness had admitted that he did not feel kindly toward defendant, he should not have been permitted to state that his feelings were influenced by the supposition that defendant had stolen cattle in the neighborhood where he lived, for such a statement was merely an expression of the opinion that defendant was a thief, and was not connected with the disappearance of the calf, nor did it explain the bias of the witness. *State v. Lee*, 40.

IDEM—ILLUSTRATION.

4. Where, in a prosecution for horse theft, defendant R. offered evidence that M. gave him a certain sorrel colt two years before, and that one of the horses alleged to have been stolen and sold was the colt in question; that M. used a "JL" brand on the left shoulder, but thereafter changed the brand to "JL" with a bar, and used it on the stifle, evidence of another that he knew the bay mare that defendant claimed to have gotten from M., and that it was not the same mare that defendant sold; and that she was branded with "JL" on the right shoulder, and that the brand which M. used for his own animals was placed on the left shoulder, and was then "JL" with a bar, while the brand on such bay mare was "JL" without the bar on the right shoulder—was not objectionable in rebuttal, though it also tended to show that defendant had committed an independent crime. *State v. Rea*, 620.

SHOWING CHARACTER OF DEFENDANT.

5. Evidence of defendant's character or his general reputation is not admissible until he has raised the issue. *State v. Lee*, 40.

QUALIFICATION OF JUROR—NEW TRIAL.

6. On a prosecution for murder, defendant moved for a new trial on the ground that a juror had made false answers, in that he had stated that he had never heard anything about the case. Defendant produced an affidavit that affiant, shortly after the coroner's inquest, met the juror in question, and talked with him, and told him all about the crime; and another affidavit stated that the juror admitted to affiant, in the presence of the one who had made the first affidavit, that the juror had talked with the latter about the case prior to the trial. The affidavit of the juror stated that he had no recollection of having ever talked with any one about the crime, and that he had never admitted that he had done so; and another affidavit, made by the one who made the first-mentioned affidavit, stated that the juror never admitted in his presence that he had ever talked about the case. *Held*, that it was not an abuse of discretion to deny the new trial. *State v. Lauth*, 342.

PUNISHMENT OF HARD LABOR.

7. Under a statute prescribing a penalty of imprisonment in jail for a criminal offense, a further penalty of hard labor is illegal.

State v. Houghton, 12.

APPEAL—FORM OF ORDER ON REVERSAL.

8. Under B. & C. Comp. §§ 1485, 1486, 173 and 1361, relating to appeals and new trials, when a criminal case is reversed for error in considering a demurrer to the information. It is the duty of the supreme court to order a new trial, subject to the discretion of the trial court as to resubmitting the case to another grand jury. *State v. Eddy*, 625.

POWER OF SUPREME COURT TO CORRECT CRIMINAL JUDGMENT.

9. A conviction being regular, a defendant is not entitled to a new trial because of a material error in punishment, but the case should be remanded to the lower court to impose a lawful sentence. The supreme court cannot correct the judgment, but it may direct the trial court to enter an authorized judgment. *State v. Houghton*, 12.

See HOMICIDE, INSANE PERSONS, LARCENY.

CRITICISED CASES in This Volume. See OREGON CASES.

CROSS COMPLAINT.

Failure to file as an Estoppel. See JUDGMENT, 4.

CROSS EXAMINATION. Scope of. See WITNESSES, 5, 6.

CURING DEFECTS.

Effect of Pleading Over—In What Cases Effective. See PLEADING, 12-17.

CURTESY.

CONTRACT BETWEEN MARRIED PERSONS AS TO MARITAL RIGHTS.

1. A contract between a wife and her husband for the relinquishment by him of his curtesy estate in her property, conferred by Sections 5544 and 5547, is entirely void both at law and in equity, as against the public policy of the State of Oregon. *McCrary v. Biggers*, 465.

ESTOPPEL TO CLAIM RIGHT OF CURTESY.

2. The fact that a husband agreed with his wife not to claim curtesy in her lands, in consequence of which she did not deed them to certain

persons, but devised them, in her will, does not estop him from claiming the curtesy, even though he allowed such persons to take possession of the land, for the contract is wholly void and no one has changed any position in reliance on it. *McCrary v. Biggers*, 465.

DAMAGES.

SURGEON'S FEES AS AN ELEMENT OF DAMAGE.

1. In a case where one has been injured so that the fingers have become webbed, the expense of a surgical operation to divide the fingers and the necessary hospital charges are all proper elements of damage.

Busch v. Robinson, 539.

MENTAL SUFFERING AS AN ELEMENT OF DAMAGE.

2. In actions for damages resulting from injuries caused by negligence, mental suffering from the same cause that produced the injury is an element of damage; but mental distress caused by the realization of resulting physical inability to properly care for and educate those dependent on the person injured is not proper to be considered as an element of consequential damages.

Maynard v. Oregon Railroad Co. 15.

EVIDENCE AS TO FAMILY OF INJURED PERSON.

3. In an action for personal injuries, evidence as to the number and ages of the members of plaintiff's family is not admissible.

Maynard v. Oregon Railroad Co. 15.

PLEADINGS AND PROOFS—ALLEGING INJURIES.

4. In an action for personal injuries, plaintiff cannot recover for a mere aggravation of a previously received injury, without alleging such aggravation in his complaint.

Maynard v. Oregon Railroad Co. 15.

PERSONAL INJURIES—SCOPE OF COMPLAINT—INTERNAL INJURIES.

5. Under a complaint showing that through the negligence of defendant plaintiff was thrown, thereby "producing serious and lasting internal injury to" her, it is competent to show that in consequence of being so thrown plaintiff has since suffered with heart trouble and neuralgia, for both may be classed as internal injuries, and it is possible that each may have been superinduced by the fall.

Rice v. Wallowa County, 374.

DAMS.

Construction of Grant of Right to Construct. See **EASEMENTS**, 1.

DANGER.

Forgetting Location of—Sudden Duty. See **MASTER & SERVANT**, 1, 2.

DEADLY WEAPON.

Instruction as to Presumption From Use of. See **HOMICIDE**, 6.

DEBT.

Contract-to Issue Court House Warrants Payable Only From Special Fund to be Raised by Taxation. See **COUNTIES**, 2.

DECEDENTS' ESTATES. Same as **EXECUTORS & ADMINISTRATORS**.

DEFAULT.

Inadvertence—Surprise—Motion to Open. See **JUDGMENT**, 1.

DEEDS.

EFFECT OF FAILURE OF CONSIDERATION ON VALIDITY.

A failure of the grantee to pay or perform the stipulated consideration for a deed that has been delivered does not render it void, but merely gives the grantor a right of action for such consideration.

Clark v. Hindman, 67.

- See CANCELLATION OF INSTRUMENTS; ESTOPPEL, 1.
- DEFECT OF PARTIES.**
 Waiver of by Not Objecting Promptly. See PARTIES, 2.
- DEFINITIONS.** Same as WORDS & PHRASES.
- DEMAND.**
 Necessity of Demand for Payment From Purchaser After Forfeiture Has Been Waived. See VENDOR & PURCHASER, 10.
- DEPENDENT COVENANTS.** See CONTRACTS, 4.
- DEPUTIES.**
 Judicial Notice of Appointment and Duties of Deputies. DIST. ATTYS. 1.
 Effect of Filing Information by Deputy. See DIST. ATTYS. 2.
 Ratification of Action of Subordinate. See DIST. ATTYS. 3.
- DILATORY PLEA.**
 Waiving Plea in Abatement by Answering to Merits. See PLEADING, 15.
- DIMINUTION OF RECORD.**
 Right to Supply Defects in Transcript. See JUSTICES OF THE PEACE, 3.
- DIRECTING JUDGMENT.**
 Ordering Particular Judgment on Remanding Cause. See COURTS, 4, 5.
- DISBARMENT.**
 Essential Element of Professional Misconduct. See ATTORNEYS, 1.
- DISCRETION.**
 Setting Aside Default by Trial Court—Review of Action. APPEAL, 13.
 Example of Sound Judgment in Deciding Motion to Open Judgment Entered by Default. See JUDGMENT, 1.
- DISMISSAL AND NONSUIT.**
 Effect of Evidence on Motion for Involuntary Nonsuit. See TRIAL, 3.
 Duty of Court When Without Jurisdiction. See APPEAL, 8.
- DISTRICT AND PROSECUTING ATTORNEYS.**
JUDICIAL NOTICE OF APPOINTMENT AND POWER OF DEPUTIES.
 1. Courts always take judicial notice of the appointment or election of their officers, and of their deputies; and of the extent of their authority.
State v. Guglielmo, 250.
- VALIDITY OF INFORMATION FILED BY DEPUTY PROSECUTOR.**
 2. An information prepared and filed by a deputy district attorney is the act of the principal officer, prima facie, and is therefore under oath, though the deputy is not a sworn officer.
State v. Guglielmo, 250.
- INFORMATION—RATIFICATION OF SIGNATURE MADE BY DEPUTY.**
 3. A district attorney, having assisted in prosecuting accused, and being present when he was arraigned, and having secured an extension of time within which to plead, adopted and ratified the signing of his name to the information by another.
State v. Guglielmo, 250.
- POWER OF DISTRICT ATTORNEY TO FILE INFORMATION.**
 4. A district attorney in Oregon has power to file informations for both misdemeanors and felonies without permission of court, acting upon his own initiative, as did the attorney general of England under the common law; but here the authority is derived directly from the statutes, and not from the common law.
State v. Guglielmo, 250.
- DIVISIBLE CONTRACTS.** See CONTRACTS, 4.

DIVORCE.

Effect of Divorce on Estates by Entirety. See **HUSBAND & WIFE**, 5.

DOWER.

VALIDITY OF CONTRACTS AS TO MARITAL RIGHTS.

A contract between a husband and wife for the release of her dower interest in his property is void as contrary to the public policy of this State on the subject of marital rights. *McCrary v. Btggers*, 465.

DUE PROCESS OF LAW.

Validity of Prosecution by Information. See **CONSTITUTIONAL LAW**, 2, 3.

EASEMENTS.

CONSTRUCTION OF GRANT.

1. A grant to a power company and its successors and assigns forever of the right to go on land on the bank of a river and construct an abutment for a dam, and to keep the same in repair, is a grant of an easement in fee, appurtenant to the grantee's plant and the realty on which it was situated, so as to pass to its successors, in view of the fact that at the time it was made the grantee was constructing on the opposite side of the river a plant to be operated by water power, and was constructing a dam for that purpose, to the knowledge of the grantor.

Sweetland v. Grants Pass Power Co. 85.

EASEMENT NOT A PUBLIC FRANCHISE.

2. A grant by a private citizen of an easement on his property is not a public franchise or privilege, though it is used in connection with and as part of the means of rendering such a privilege useful.

Sweetland v. Grants Pass Power Co. 85.

RECORD NOTICE—INSTRUMENT ENTITLED TO RECORD.

3. A deed granting an easement in fee is entitled to record, and, being recorded, is notice to subsequent grantees of the servient estate.

Sweetland v. Grants Pass Power Co. 85.

TRANSFER OF EASEMENT AS AN APPURTENANCE.

4. An easement appurtenant, as, for example, the right to construct on a stated tract abutments for a dam, passes under a grant of the dominant estate without being specially mentioned.

Sweetland v. Grants Pass Power Co. 85.

WAY OF NECESSITY.

5. Where a parcel of land sold out of a larger tract is not accessible from any public highway, being surrounded by land of other owners except where touched by the remaining property of the grantor, the deed impliedly conveys also a right of way over the latter tract to a highway.

Brown v. Kemp, 517.

USE AS NOTICE OF EXISTENCE OF AN EASEMENT.

6. The open and visible use of an easement—as, a road—is notice to a purchaser of the servient estate of the existence and extent of the right.

Brown v. Kemp, 517.

See, also, **WATERS**, 3.

ELECTION OF REMEDIES.

COMPELLING ELECTION BETWEEN CAUSES OF ACTION OR DEFENSE.

1. Where a pleading shows double statements of the same cause of action, or different grounds of recovery for the same right, the plaintiff will usually be required before the taking of evidence begins to select one ground and abandon the others; but this will not be required unless the

facts constituting the different causes or defenses are so inconsistent that the proof of one disproves another.

Fleishman v. Meyer, 267; *Harvey v. Southern Pacific Co.* 505.

EXAMPLE OF ELECTION REQUIRED.

2. A plaintiff having stated a cause of action under the statute against a railroad company for killing stock on unfenced track, and having also stated a cause of action for ordinary negligence in killing the same stock at the same place with the same train, the court properly required him, before offering evidence, to select either the statutory or the common-law negligence and abandon the other.

Harvey v. Southern Pacific Co. 505.

EXAMPLE OF ELECTION NOT REQUIRED.

3. In an action for damages for failure to deliver personal property within the time required by the contract of sale, the answer set out as an excuse the condition of the bar at the entrance of a bay which was a part of the route for delivery by water, caused by storms which had prevailed for a long time prior to the date limited for delivery, and the cause of failure to deliver was alleged to be an act of God. The answer also set out the receipt by plaintiffs, after the time limited for delivery, of a portion of the property, in pursuance of a modified agreement, and it was averred that plaintiffs thereby waived all demands arising out of the original contract. *Held*, that, even though the answer set out more than one defense, the averments therein were not so inconsistent as to compel the defendants to elect on which one they would rely.

Fleishman v. Meyer, 267.

ELECTRICITY.

Right of Electric Power Company to Condemn. See EMINENT DOMAIN.

EMINENT DOMAIN.

STATUTES—APPROPRIATION OF WATERS BY ELECTRICAL COMPANIES—WHEN RIGHT IS PERFECTED—EMINENT DOMAIN.

1. B. & C. Comp. §§ 5022 and 5023, authorizes corporations engaged in furnishing electrical power for all purposes to use the surplus water of the streams of the State for water power, and to condemn the rights of riparian proprietors, and also rights of way for ditches. Section 5026 declares that when the point of diversion shall have been selected the appropriator shall post a certain notice thereat, and Section 5027 requires the filing for record within ten days thereafter of a similar notice, and a map showing the general route of the ditch. Section 5028 provides that, when such corporation shall have acquired the right to appropriate water in the manner provided, it may condemn lands necessary for the right of way for its ditch. *Held*, that where a corporation organized for furnishing electrical power for all purposes has selected a point for the diversion of the water of a stream, and has surveyed and located the line of its ditch, and has posted the required notice, and filed the notice and map, its right to appropriate the water is thereby acquired. Thereafter the corporation may maintain an action of condemnation without showing that it is the sole owner of the banks of the stream in question from the point of the proposed diversion to the mouth thereof, or that it has secured from the riparian proprietors below the proposed point of diversion the right to divert the surplus water in such stream.

Grande Ronde Electrical Co. v. Drake, 243.

CONSTITUTION—EMINENT DOMAIN—PRIVATE USE.

2. The provision in Const. Or. Art. I, § 18, that private property shall not be taken for public use without just compensation first assessed and

tendered, impliedly prohibits the taking of private property for private use, even though just compensation be made therefor.

Grande Ronde Electrical Co. v. Drake, 243.

EMINENT DOMAIN—LEGISLATIVE AND JUDICIAL QUESTIONS.

3. The necessity of exercising the right of eminent domain in general classes of cases is a legislative question, but whether the use in a particular instance is public or private, and the extent of the use necessary, are to be determined by the courts as questions of fact; for example, the legislature may determine that corporations furnishing electricity for sale shall be allowed to condemn private property for their use, yet as to the nature of the use to which a particular piece of property is to be put and the extent of the needs of the condemnor, there may be a question, which the courts must decide.

Grande Ronde Electrical Co. v. Drake, 243.

SUIT TO CONDEMN WATER AND DITCH RIGHTS FOR ELECTRICAL PURPOSES.

4. Sections 5022-5027, of B. & C. Comp. declare the use of water of the streams of the State for furnishing electrical power for all purposes a public use, and authorize corporations created for such purpose to use such streams therefor, so that the use may not materially impair the rights of prior appropriators, on the corporation complying with certain prescribed conditions. Section 5028 declares that when such corporation shall have acquired the right to appropriate the water "in the manner hereinbefore provided it may proceed to condemn lands and premises necessary for right of way for its ditch"; and Sections 5029 and 5030 authorize such corporations, when authorized as so provided, to appropriate water and construct and maintain a ditch, to maintain an action to condemn a right of way for such ditch, and also for the condemnation and appropriation of the right to the flow of the water in any stream from which it is proposed to divert water below the point of diversion vested in riparian proprietors. *Held*, that a corporation, having so acquired the right to appropriate water, may maintain an action either to condemn land for a ditch, or to condemn the right to have the water flow in the channel of the stream through the premises of a riparian proprietor, or it may sue for both purposes in one action when both rights are vested in the same defendant.

Grande Ronde Electrical Co. v. Drake, 243.

ENTIRETY, Estate by.

Effect of Deed to Husband and Wife Jointly. See **HUSBAND & WIFE, 2.**

Effect of Mortgage on Interest by Entirety. See **HUSBAND & WIFE, 3.**

Effect of Divorce on Rights of Parties. See **HUSBAND & WIFE, 5.**

EQUAL PROTECTION OF THE LAWS.

See **CONSTITUTIONAL LAW, 4; STATUTES, 3.**

EQUITY.

JURISDICTION—REMEDY AT LAW—ACCOUNTING.

1. Equity has no jurisdiction over a proceeding to recover a definite sum of money claimed by plaintiff, unless the accounts are too long and complicated to be appropriately submitted to a jury, the remedy at law being ordinarily sufficient.

Kaston v. Paxton, 308.

ENJOINING MUNICIPALITIES.

2. Equity will restrain the action of municipal corporations attempting to proceed beyond their delegated powers.

Sandys v. Williams, 327.

See **ACCOUNTING; BILL OF REVIEW; COSTS; MUNICIPAL CORPORATIONS, 3; QUIETING TITLE.**

ERASURE.

Effect of In Document Admitted to Have Been Executed and Delivered as Claimed. See **EVIDENCE**, 14.

ESCHEAT.

NEED OF TERMINATION OF ADMINISTRATION.

Under B. & C. Comp. §§ 5577, subd. 7, 5578, subd. 5, and 5614, defining the conditions under which property escheats to the State, and Section 5616, providing for the commencement of escheat actions by the law officer of the State, such actions must be subordinate to the probate proceedings in the county court, and before a judgment of possession can be entered in an escheat case it must appear that the estate has been finally settled.

Oregon v. Simmons, 159.

ESTATES

Of Decedents. Same as **EXECUTORS & ADMINISTRATORS**.

Of Insolvents. See **BANKRUPTCY**; **RECEIVERS**.

ESTOPPEL.

ESTOPPEL BY RECITAL IN DEEDS.

1. A claimant of the right to approach and use deep water fronting his upland is not estopped to dispute the character of certain land claimed to be tide land, and which he must cross, by a reference thereto as such in some of his title deeds, where it is apparent that such reference was not intended as an admission or statement as to the character of the land, but was added as a matter of precaution.

Sengstacken v. McCormac, 171.

ESTOPPEL OF GRANTOR BY REPRESENTATIONS.

2. A grantor who has by his own conduct or statements influenced his grantee to so act with relation to the property conveyed that he will be injured if the grantor changes his position in the matter, is bound by his original acts, and estopped to claim otherwise.

Clark v. Hindman, 67.

IDEM.

3. A father, in order to locate the eastern boundary of premises intended to be conveyed by him to his daughter, made certain measurements, pointed out to her the line which he supposed formed the eastern boundary of the land, and executed a deed to her based on such measurements. He thereafter put up a partition fence on the line so located, and in the absence of the daughter again measured the land, selected the site for the house, and superintended its entire construction thereon, she paying part of the cost. *Held*, that the father was estopped to subsequently deny that the line so pointed out and established was the true eastern boundary of the land intended to be conveyed.

Clark v. Hindman, 67.

FAILURE TO FILE EQUITABLE CROSS BILL AS AN ESTOPPEL.

4. The failure of a defendant to present certain facts by cross bill, as an equitable defense to a law action, under Section 391 of B. & C. Comp. does not estop such defendant from subsequently asserting the same facts as a cause of an independent suit to obtain appropriate relief.

Clark v. Hindman, 67.

CONDUCT CONSTITUTING AN ESTOPPEL.

5. The grantor of an easement who has acquiesced in a change of the point of use of the right granted, on the strength of which the grantee has expended appreciable sums of money, cannot afterward object to the making of repairs at the new point of use.

Sweetland v. Grants Pass Power Co. 85.

VENDOR AND PURCHASER—ORAL MODIFICATION OF WRITTEN CONTRACT.

6. A party to a written contract for the sale of land, who knowingly gives an oral consent to a postponement of the performance of some material provision that is of benefit to the one consenting, will not be permitted to insist, after the other party has acted on the consent, that such consent is void because not written, and enforce the contract as originally made, even though time and the prompt performance of the deferred condition were made essential.

Neppach v. Oregon & California Railroad Co. 374.

IMPLIED REPRESENTATION OF AUTHORITY.

7. An employer who knowingly permits an employee to be held out to the public as an independent dealer will not be permitted to deny that claim as against those who have dealt with him in good faith as an independent dealer without knowledge of the actual facts.

Gardner v. Wiley, 96.

EVIDENCE.

JUDICIAL NOTICE OF RECORDS OF VOLUNTARY ASSOCIATIONS.

1. The custom of voluntary unincorporated associations to keep a record of their proceedings is so universal in the United States that the courts will take judicial notice thereof, and presume that such a record was kept; as, for example, of the proceedings of a meeting of the Master Mechanics' Association.

Norwich Insurance Society v. Oregon Railroad Co. 123.

JUDICIAL NOTICE OF OFFICERS AND DEPUTIES.

2. Courts take judicial notice of the tenure of their officers and the deputies of such officers, and of their authority, so that proof is not necessary on either point.

State v. Gugheimo, 250.

BURDEN OF PROOF.

3. A party alleging a fact as the basis of an asserted right has the burden of proving such allegation.

Bauers v. Bull, 60.

MATERIALITY OF EVIDENCE ON POINT NOT IN ISSUE.

4. A denial of a statement not pleaded does not raise an issue, and no evidence should be permitted in support of it.

Brown v. Feldwert, 363.

BEST AND SECONDARY EVIDENCE OF RECORDS OF VOLUNTARY UNINCORPORATED ORGANIZATIONS.

5. Parol evidence is not competent to show matters of record without accounting for the absence of the writing. For instance, where it is sought to show that a railroad company uses on its engines the spark arrester recommended by the organization called the Master Mechanics' Association, the record of the proceedings concerning such adoption is the best evidence of what was done, and oral statements on the subject are prima facie inadmissible.

Norwich Insurance Society v. Oregon Railroad Co. 123.

MEMORANDUM DELIVERED AS EVIDENCE OF AN ADMISSION.

6. A memorandum of the terms of a proposed contract, prepared by one of the negotiating parties and delivered to the other, who made no objection thereto, is competent in an action involving the terms of the agreement as an admission by the receiving party.

Pacific Export Co. v. North Pacific Lumber Co. 194.

ADMISSIONS OF AGENTS—PAST TRANSACTIONS.

7. In an action against a corporation for the loss of certain horses hired to it by plaintiff, alleged to have been killed or permanently injured by the negligence of defendant's servants, admissions or declarations made

by defendant's agents as to the manner in which the horses were used and injured, not a part of the *res gestae*, but mere historical narrative of past occurrences, are inadmissible.

Alden v. Grande Ronde Lumber Co. 593.

MEMORANDUM AS EVIDENCE UNDER OREGON STATUTE.

8. The old rule as to the use by witnesses of memoranda made by themselves or others has been so modified by Section 848, B. & C. Comp., that the memorandum can be used only when it was made by the witness or under his direction. If the memorandum was made by another and not under the direction of the witness, it cannot be referred to, even though the witness saw it soon after it was made, and then knew of his own knowledge that it conformed to the facts.

Manchester Assurance Co. v. Oregon Railroad Co. 162.

MEMORANDA—NATURE OF EVIDENCE—REFRESHING MEMORY.

9. Memoranda are but secondary evidence, and not competent if the witness is able to testify without referring to them, or if he is able to testify from recollection after refreshing his memory by inspecting them.

Manchester Assurance Co. v. Oregon Railroad Co. 162.

BUSINESS AND PRIVATE MEMORANDA COMPARED.

10. The admissibility of business and private memoranda is not controlled by quite the same rule, the practice being rather more liberal in reference to the former.

Manchester Assurance Co. v. Oregon Railroad Co. 162.

ADMISSIBILITY OF MEMORANDA MADE BY CLERKS.

11. Where locomotive inspectors enter the results of their regular inspections on slips which are filed in a designated office, where the information is, under the regulations of the office, copied by a clerk into a book which the inspectors subsequently sign after comparing the copy with the original data, it is error to permit an inspector to refresh his memory from the book without producing the original entries, or accounting for their absence.

Manchester Assurance Co. v. Oregon Railroad Co. 162.

IDEM.

12. Where original memoranda of locomotive inspections are shown to be lost, other memoranda made from the original slips by a clerk in accordance with his duties, and shown by the evidence of the clerk and inspectors to be correct, are admissible.

Manchester Assurance Co. v. Oregon Railroad Co. 162.

SUFFICIENCY OF UNPROBATED DOCUMENT TO CONVEY PERSONAL PROPERTY.

13. A document insufficient as a will, under the laws of Oregon, and not probated elsewhere, is not evidence of any statement therein contained as a bequest of personalty.

Montague v. Schieffelin, 413.

ERASURE IN ADMITTED DOCUMENT.

14. The execution and delivery of an instrument being admitted, its production is unnecessary, and in case it is offered in evidence, an unexplained erasure is immaterial and does not affect its admissibility.

Brown v. Feldwert, 363.

PAROL EVIDENCE OF COLLATERAL ORAL AGREEMENT.

15. It may be shown by parol that at the time a warehouse receipt was pledged to secure a loan evidenced by a note it was agreed that the surplus proceeds from the sale of the pledged property, after payment of such note might be applied on prior notes of the pledgor held by the pledgee, this agreement being oral and collateral to the writing showing the indebtedness.

Lewis v. First National Bank, 182.

PAROL EVIDENCE TO VARY WRITTEN CONTRACT.

16. The rule against varying the terms of a writing by parol evidence is not applicable where the existence of the memorandum is denied, and the evidence is offered to explain what the writing really is.

Schwarz v. Lee Gon, 219.

PAROL EVIDENCE TO SHOW PURPOSE OF WRITING.

17. Where the language of a written instrument is ambiguous, equivocal, or susceptible of conflicting interpretations, it is competent to ascertain by parol evidence the purpose and object of the parties from the surrounding circumstances, and thereafter to enforce it in accordance with such intention.

Baker County v. Huntington, 275.

PAROL EVIDENCE SHOWING PURPOSE OF A BOND BY A SHERIFF.

18. Parol evidence is competent to show the circumstances connected with the giving of a bond by a public officer in order to determine its nature and effect, as, for example, that a certain bond filed by a sheriff, who was ex officio tax collector, was intended to cover his special liability for tax money, although it purported to be his ordinary official undertaking.

Baker County v. Huntington, 275.

EVIDENCE OF MEANING OF PARTICULAR TERMS.

19. In an action on a contract to purchase a quantity of lumber at a specified price for "merchantable lumber, mill run," it is competent to show by oral testimony the meaning of those words in the lumber business in that vicinity, they being unusual words without settled judicial meaning.

Barnes v. Leidigh, 43.

PHOTOGRAPHS OF A RAILROAD WRECK AS EVIDENCE.

20. In an action for injuries to a passenger, received in a collision of railroad trains, photographs of the scene of the wreck taken the next morning after the accident, and before the conditions have been materially changed, are admissible to show the force of the collision.

Maynard v. Oregon Railroad Co. 15.

SUBJECT OF EXPERT TESTIMONY—LASTING QUALITY OF TIMBERS.

21. Expert testimony is competent to show how long certain kinds of timber will remain sound under stated conditions, as, when partly covered with earth, that not being a matter of common observation or knowledge.

Rice v. Wallowa County, 574.

QUALIFYING EXPERT BY CROSS-EXAMINATION.

22. An error in holding a witness qualified as an expert, on examination in chief, is cured, where, on cross-examination, his qualification is shown.

Rice v. Wallowa County, 574.

EXCEPTIONS.

Form and Contents of Proper Bill of Exceptions. See **APPEAL**, 6.

EXCUSABLE NEGLECT

As Reason for Opening Default. See **JUDGMENT**, 1.

EXECUTION.

SUPPLEMENTARY PROCEEDINGS—SUFFICIENCY OF FINDINGS TO SUPPORT JUDGMENT—CONTEMPT.

1. The presumption declared by B. & C. Comp. §788, subd. 33, that conditions shown to exist continue as long as such conditions usually do, does not apply to the possession of money shown to have been on hand two years before. For example, a conclusion in March, 1904, that a judgment debtor has on hand enough money to satisfy a judgment of \$600 and costs, is not supported by findings that in May, 1902, he received

\$2,000, that since then he had steadily earned three dollars per day; that he had no family except his wife, who during this time had been keeping boarders for pay; and that no satisfactory explanation had been made of what had been done with the \$2,000. *State ex rel. v. Guttridge*, 215.

OWNERSHIP OF RENT ACCRUING BETWEEN EXECUTION SALE AND DATE OF REDEMPTION—CHOSE IN ACTION.

2. Rent for premises sold on execution becoming due after the date of the sale but before a redemption is an assignable chose in action belonging to the execution debtor, and does not pass with a conveyance of the land unless specially mentioned. *Kaston v. Paxton*, 308.

EXECUTORS AND ADMINISTRATORS.

JURISDICTION OF COUNTY COURT TO ADJUDICATE CLAIM PRESENTED BY ASSIGNEE OF ORIGINAL CLAIMANT.

1. Does the "claimant" mentioned in Section 1161, B. & C. Comp., which provides that after a claim has been presented to a personal representative and rejected, "said claimant" may have an adjudication thereof by the county court, include an assignee of the claim who acquired his interest from the person who originally presented the claim after its presentation? *Morgan's Estate*, 233.

PRESENTING CLAIM—WAIVING MATTER IN ABATEMENT.

2. The objection that a claim against a decedent's estate was not presented by the proper person is a matter in abatement only, and is waived by joining issue on the merits. *Morgan's Estate*, 233.

See **COURTS**, 1, 2, 3; **LIMITATION OF ACTIONS**, 3.

EXPERT.

Showing Qualification on Cross Examination. See **EVIDENCE**, 22.

Qualification of by a Practical Experience. See **WITNESSES**.

Proper Subject for Expert Testimony. See **EVIDENCE**, 21.

FALSE REPRESENTATIONS. See **FRAUD**.

FEES

Of Justices When Acting as Committing Magistrates Under the Provisions of the Statute. See **JUSTICES OF PEACE**, 1.

Suit Against County After Refusal to Audit. See **COUNTIES**, 8.

Of Attorneys Employed by a Receiver as Costs. See **RECEIVERS**, 1.

FENCES.

Limits of Station Grounds Not Necessary to Fence. See **RAILROADS**, 2.

FINAL ORDER.

Appealable and Unappealable Orders. See **APPEAL & ERROR**, 1-4.

FINDINGS by Judge.

Necessity of Covering Intermediate Issues. See **TRIAL**, 15, 16.

Sufficiency of Findings—Inferences. See **TRIAL**, 10, 11.

Time Before Judgment After Filing. See **JUDGMENT**, 3.

Findings and Conclusions Not a Judgment. See **JUDGMENT**, 2.

Conclusiveness of Findings on Appeal. See **APPEAL**, 14.

Necessity of Covering Material Issues. See **TRIAL**, 13.

Necessity of Covering Admitted Issues. See **TRIAL**, 13.

FIRES.

Sparks From Engine—Speed—Instructions. See **RAILROADS**, 3-6.

FORFEITURE.

- Example of Self-Forfeiting Contract of Sale. See **VEND. & PUR. 5.**
 Waiver of Right of Vendor to Forfeit—Effect of Subsequent Conduct of Parties. See **VENDOR & PURCHASER, 8, 9, 10.**
 Notice of Intent to Forfeit After Waiver. See **VEND. & PUR. 10.**

FRANCHISE.

- Easement Not a Public Franchise Though It May Make a Franchise Useful and Valuable. See **EASEMENTS, 2.**

FRATERNAL INSURANCE.

- Sufficiency of Service on Local Secretary. See **CORPORATIONS, 3.**

FRAUD.

FALSE REPRESENTATIONS—SUFFICIENCY OF COMPLAINT.

1. A complaint in which is charged the making of a contract whereby defendant, for a valuable consideration, was to show plaintiff a piece of vacant public land, title to which he could secure by complying with the homestead law, and that the land to which he was taken was not vacant, and he was unable to obtain it as a homestead because of mining claims thereon, shows a cause of action for false representations.

David v. Moore, 148.

ACTION AGAINST BROKERS FOR FALSE REPRESENTATION AS TO LAND PROCURED FOR THEIR PRINCIPAL.

2. An action by a purchaser of land against the broker through whom he bought, for falsely representing the nature and title of the property, is not analogous to an action for breach of a covenant for quiet enjoyment, in the sense that no action can be maintained until there has been an ouster, for the broker is not a vendor.

David v. Moore, 148.

FRAUDULENT MISREPRESENTATIONS—CAVEAT EMPTOR.

3. The rule that a party is bound by his conduct, based on personal knowledge, or on available information, does not apply to cases where a vendor of real property makes representations concerning which the purchaser has neither knowledge nor means of knowledge. This is an instance: Where defendant was employed to find plaintiff unclaimed government land which he could locate as a homestead, and showed plaintiff a tract which he was unable to secure because it was already claimed as mineral land, the fact that there were evidences of mining claims on the land when plaintiff examined it does not prevent plaintiff from suing for breach of contract, defendant having falsely represented that the mining claims had long since been abandoned, and would be no obstacle to securing the land as a homestead, and plaintiff being wholly unfamiliar with mines.

David v. Moore, 148.

FALSE REPRESENTATIONS—DEFENSES.

4. The non-mineral affidavit filed by plaintiff in making his homestead entry does not prevent him from suing defendant, whom he had employed to locate him on public land, for false representations in relation to such location, where plaintiff testified that he made such affidavit relying on the representations made by defendant.

David v. Moore, 148.

INSTRUCTION AS TO RELIANCE ON FALSE REPRESENTATIONS.

5. In an action for false representations in locating plaintiff on public land, an instruction, "If you find these representations were made, and that they were false, and that defendant knew them to be false, and that plaintiff relied on them, plaintiff would be entitled to recover," is not subject to the objection that it omits the element of belief of the representations on plaintiff's part, for reliance necessarily implies belief.

David v. Moore, 148.

OPINION AS A FALSE REPRESENTATION.

6. Defendant was employed to select plaintiff a parcel of public land which he could locate as a homestead, and, in an action for false representations as to mineral claims on the parcel selected, the court instructed that "a statement or conversation which simply expressed the opinion of defendant as to whether or not there was a mining claim, or that it had been abandoned or forfeited, would not be a misrepresentation of a fact such as would entitle plaintiff to recover." *Held*, to be as favorable to defendant as he could reasonably expect. *David v. Moore*, 148.

PLEADING FRAUD IN SIGNING WRITING.

7. It is absolutely essential in pleading that a signer of a paper was fraudulently misled as to what was being signed to show that such signer was free from negligence in the matter. *Brown v. Feldwert*, 363.

FRAUDULENT CONVEYANCES.

FRAUDULENT SALE—KNOWLEDGE OF VENDEE.

In order to avoid a sale of chattels on the ground of fraud, the vendee must have had notice of the vendor's fraudulent design.

Jennings v. Frazier, 470.

FRAUDS, STATUTE OF. Same as STATUTE OF FRAUDS.

FRENZY.

Jealous Anger and Rage Is Not Insanity. See HOMICIDE, 3.

GAMBLING.

Power to Prevent Under Nuisance Statute. See GAMING, 1, 3.

GAMING.

POOL ROOM AS PUBLIC NUISANCE—GAMBLING.

1. A pool room in which persons daily congregate to bet upon horse races reported to the proprietor by telegraph, is a gaming house.

State v. Nease, 433.

POWER OF CITY TO LICENSE POOL ROOM—CONSTRUCTION OF CHARTER.

2. A city which by its charter is authorized to prevent and suppress gaming and gambling houses is not authorized to make such places lawful by licensing them.

State v. Nease, 433.

GAMBLING ROOMS ARE NUISANCES.

3. Gambling rooms where dissolute persons congregate were nuisances at common law, and their proprietors were indictable, and in Oregon such places are within the prohibition of Section 1930, B. & C. Comp.

State v. Nease, 433.

GENERAL REPUTATION.

When Evidence of Reputation Is Competent. See CRIM. LAW, 5.

GRAND JURY.

Validity of Prosecution Without Presentment to Grand Jury—Deprivation of Liberty—Due Process of Law. See CONST. LAW, 3.

HARD LABOR.

Adding This Element to Sentence of Confinement. See CRIM. LAW, 7.

HARMLESS ERROR. See APPEAL & ERROR, 17, 18.

HIGHWAYS.

ROAD OF PUBLIC EASEMENT TO RESIDENCE—REFUSAL TO CONFIRM REPORT OF VIEWERS FOR INADEQUACY OF DAMAGES.

1. Under Section 22 of the act of 1903, relating to the establishment of roads from existing legal public roads to isolated residences (Laws 1903,

pp. 262, 269), the county court cannot refuse to confirm the report of the viewers because the damages allowed are inadequate, where that fact must be shown by evidence. *Kemp v. Polk County*, 546.

SUFFICIENCY OF PETITION FOR ROAD TO PRIVATE RESIDENCE.

2. A petition for the location of a road from an existing legal public road to an isolated residence under Laws 1903, pp. 262, 269, § 20, need not contain any facts or statements other than those required by the statute. *Kemp v. Polk County*, 546.

REPORT OF VIEWERS AS TO LOCATION OF ROAD TO RESIDENCE.

3. Under Section 21 of the act of 1903, relating to the laying out of a road from an existing legal public road to an isolated residence, the viewers need not locate such road on the most desirable route, since the statute does not so require. *Kemp v. Polk County*, 546.

Use of Road as Notice of Existence of Servitude. See EASEMENTS, 6.
Right to Way of Necessity. See EASEMENT, 5.

HOMICIDE.

SELF-DEFENSE AFTER PROVOKING QUARREL.

1. The law of self-defense cannot be invoked by one who has provoked the fatal encounter, unless he subsequently, in good faith, endeavored to withdraw. *State v. Gray*, 24.

SELF-DEFENSE—AVOIDING DANGER—RETREATING.

2. A person at a place where he may lawfully be, if not the aggressor in a conflict, is not obliged to retreat from the assailant, but he should make such reasonable efforts to avoid taking life as are consistent with his own safety. *State v. Gray*, 24.

SUDDEN FRENZY NOT INSANITY.

3. A sudden and frenzied paroxysm of anger or jealousy is not insanity in one otherwise in possession of his mental faculties, unaffected by heredity or disease, and does not relieve him from responsibility for crime. *State v. Lauth*, 342.

JEALOUS RAGE—INSTRUCTIONS AS TO CRIMINAL RESPONSIBILITY.

4. A statement by the trial judge that jealous anger at the conduct of one's mistress is not insanity, and that the difference between the two is quite clear, is not error, particularly where the judge further offered to receive evidence tending to show insanity, or the condition of defendant's mind, together with information that had been communicated to him, and having instructed that the jury had a right to consider the condition of defendant's mind at the time of the homicide, as bearing on the degree of the offense. *State v. Lauth*, 342.

KIND OF PROOF OF CORPUS DELICTI REQUIRED.

5. The death of the person alleged to have been killed is a necessary element in a prosecution for homicide, and must be established either by direct testimony or by circumstantial evidence of the most convincing nature. No general rule as to sufficiency can be stated, except that the best evidence obtainable should be produced, each case being dependent upon its particular circumstances. *State v. Williams*, 287.

EFFECT OF INSTRUCTION AS TO USE OF DEADLY WEAPON.

6. An instruction that "an intent to murder is conclusively presumed from the deliberate use of a deadly weapon, causing death within a year, if not done in self-defense or in the rightful and necessary defense of property," did not impose on defendant the burden of showing that the killing was in self-defense. *State v. Gray*, 24.

HOPS.

Sale of—Title Passes at Segregation and Payment. See **SALES**.
 Replevin for Undivided Interest in Several Bales. See **REPLEVIN**.

HUSBAND AND WIFE.

CONTRACTS BETWEEN HUSBAND AND WIFE AS TO MARITAL RIGHTS.

1. Any inchoate right that a husband or wife may have in the property of the other cannot be the subject of a valid contract between them.

McCreary v. Biggers, 465.

EFFECT OF DEED TO HUSBAND AND WIFE—ENTIRETIES.

2. A deed to a husband and wife creates an estate by entirety, even though the husband provided the purchase price, in the absence of evidence of a trust.

Hayes v. Horton, 597.

EFFECT OF CONVEYANCE ON ESTATE BY ENTIRETY.

3. Either party to an estate by entirety may mortgage his or her interest without changing the status of the property right of the other party thereto.

Hayes v. Horton, 597.

RESULTING TRUST NOT PRESUMED BETWEEN HUSBAND AND WIFE—PRESUMPTION OF GIFT.

4. In the case of a purchase of land by a husband, the title being taken in the name of his wife, or in the name of himself and wife, it will be presumed that the purchase price was an advancement or gift to the wife, rather than that the title was held by the wife as trustee.

Hayes v. Horton, 597.

EFFECT OF DIVORCE ON ESTATE BY ENTIRETY.

5. The effect of a divorce between persons holding land by the entirety is to dissolve that estate and leave them as tenants in common.

Hayes v. Horton, 597.

IDENTITY

Of Body of Deceased. See **HOMICIDE**, 5.

IMMUNITIES

Granted to Some But Not All Citizens. See **CONST. LAW**, 4.

IMPANELING JURY. See **JURY**, 2, 3, 4.

IMPLIED AMENDMENT. See **STATUTES**, 6, 7, 8.

INADEQUACY

Of Price as Reason for Setting Aside Deed. See **CANCEL OF INST.** 3.

INADVERTENCE

As Reason for Opening Default. See **JUDGMENT**, 1.

INCONSISTENT POSITIONS.

Rights of Others Who Have Acted in Good Faith. See **ESTOPPEL**, 5.

INDICTMENT AND INFORMATION.

NECESSITY OF BRING UNDER OATH.

1. An indictment or information in the form set forth in the statute, B. & C. Comp. § 1304, is sufficient, though it does not purport to be under oath, as both the grand jury and the district attorney are required to perform their duties under their oaths of office, and presumably their duties were so discharged.

State v. Guglielmo, 250.

SUFFICIENCY OF OATH.

2. An information is supported by oath, as required by the Fourth Amendment to the Constitution of the United States, and Section 9 of the Bill of Rights of Oregon, since it is filed by the district attorney, who is

an officer acting under an official oath, performing the duties formerly devolving on a grand jury. *State v. Guglielmo*, 250.

IMPLIED OATH.

3. An information prepared and filed by a deputy district attorney is in effect the act of the district attorney himself and therefore performed under oath, though the deputy is not a sworn officer, particularly where the principal officer calls the case for trial on the information so filed. *State v. Guglielmo*, 250.

SURPLUSAGE.

4. In construing a sentence of imprisonment accompanied by "hard labor," this additional penalty cannot be rejected as surplusage, as it is a definite qualification of the judgment pronounced, and its rejection will materially change the punishment. *State v. Houghton*, 12.

EFFECT OF MOTION TO SET ASIDE.

5. A motion to set aside a criminal information on the ground that it was not found, indorsed, or presented as required by law was insufficient to challenge the appointment of the deputy district attorney who prepared and filed the information. *State v. Guglielmo*, 250.

PROOF OF OFFICIAL POSITION OF DEPUTY.

6. Where it appears in a criminal case that the information has been prepared and filed by a deputy district attorney, the court will take notice of the official position of the deputy and of his authority, so that proof is not necessary on either point. *State v. Guglielmo*, 250.

INFORMATION—IDENTIFYING PARTY ACCUSED.

8. Under Section 1306, B. & C. Comp., an information must show with certainty that the person accused committed the offense charged, but it is not necessary to repeat the name; though of course the defendant must be connected by some appropriate words with every act charged. *State v. Eddy*, 625.

CERTAINTY AS TO PARTY CHARGED—INFERENCE NOT PERMISSIBLE.

9. While under B. & C. Comp. § 1316, an indictment need not state presumptions of law, yet inferences, however reasonable, are not permissible to interpret the language of a formal charge where certainty is demanded by statute. *State v. Eddy*, 625.

See, also, LARCENY, 1, 2; ROBBERY, 1, 2.

INDORSEMENT.

Transfer by One of Several Joint Payees. See *BILLS & NOTES*, 1.
By Person Under a Firm Name. See *BILLS & NOTES*, 2.
Effect of Indorsement for Collection. See *BILLS & NOTES*, 3, 4.
Right of Restrictive Endorsee to Sue. See *BILLS & NOTES*, 5, 6.

INDUCEMENT in Pleadings.

Necessity and Effect of Denying. See *PLEADING*, 5.

INFANTS.

INFANTS—VALIDITY OF JUDGMENT AGAINST.

1. A judgment or decree against an infant by a court having jurisdiction of the subject and of the parties is as valid as one entered against an adult. *Harding v. Harding*, 178.

CONTRACTS OF INFANTS.

2. No lien will be imposed by equity upon the property of a minor in favor of one who has advanced money at the request of such minor to

redeem the property from a mortgage sale, even though the minor agreed that the lender should be subrogated to the rights of the mortgage creditor.

Burton v. Anthony, 47.

See **QUITTING TITLE**.

INFORMATION. Same as **INDICTMENT**.

INJUNCTION.

When Municipal Officers Exceed Their Authority. See **MUNIC. CORP.** 3.

INSANE PERSONS.

INSANITY.

A sudden and frenzied paroxysm of anger or jealousy is not insanity in one otherwise in possession of his mental faculties, unaffected by heredity or disease, and does not relieve him from responsibility for crime.

State v. Lauth, 342.

INSOLVENCY. See **BANKRUPTCY**.

INSTALLMENTS.

Accrual of Right of Action for Breach of Contract to Be Performed in Parts at Different Times. See **ACTION**.

INSTRUCTING JURY.

Charge Must Be Considered as a Whole. See **TRIAL**, 7.

Refusing Instructions Already Given. See **TRIAL**, 9.

Favorable Instruction Is Not Objectionable. See **APPEAL**, 5.

Refusing Requests for Irrelevant Instructions. See **TRIAL**, 8.

Repetition of Qualifying Phrases Not Necessary. See **TRIAL**, 6.

Desired Instructions Should Be Presented to Judge. See **TRIAL**, 5.

INSURANCE.

INSURANCE—CONSTRUCTION OF POLICY THAT DOES NOT BECOME EFFECTIVE UNTIL PAYMENT OF PREMIUM.

1. An application for insurance, made May 5th, stipulated that any policy that might be issued should not be in force until the actual payment and acceptance of the premium, during the applicant's lifetime and good health. The policy was issued, and a two years' term premium paid on July 24th. The policy provided that it was issued in consideration of the application, which was made a part of the contract, and in further consideration of the two years' term premium, and of the payment of the life premium on the 5th day of May every year thereafter during the continuance of the policy. *Held*, that the insurance became effective for the entire term of the policy, subject to the provisions prescribing forfeiture for nonpayment of premiums, on July 24th, and the term premium covered and paid for insurance for two years from that date.

Stinchcombe v. New York Life Insurance Co. 315.

FORFEITURE—INCONSISTENT PROVISIONS OF POLICY.

2. Where a life insurance policy was issued on May 5th, but did not go into effect until July 24th, when the premium for two years was paid, the failure to pay a premium on May 5th, two years later, did not forfeit the policy, under a provision of forfeiture for nonpayment of any premium, the premiums being due on May 5th of each year, for the payment of the double premium extended the life of the contract for two years from July 24th.

Stinchcombe v. New York Life Insurance Co. 316.

TIME FOR FURNISHING PROOFS OF DEATH.

3. Noncompliance with a provision of an insurance policy requiring the beneficiary to furnish proofs within one year after the death of insured, to

which no penalty is subjoined for nonobservance, does not forfeit the policy, but merely requires the furnishing of proofs prior to the bringing of an action. *Stinchcombe v. New York Life Insurance Co.* 316.

EFFECT OF RETAINING PROOFS OF DEATH WITHOUT OBJECTION.

4. The action of an insurance company in retaining without objection the proofs of death furnished by the beneficiary of a policy amounts to an approval of them. *Stinchcombe v. New York Life Insurance Co.* 316.

ACTION—SUFFICIENCY OF AGENCY OF SECRETARY.

5. Under Section 55, B. & C. Comp., providing for service of process on a resident "agent" of a corporation under some circumstances, service on a nonresident fraternal benefit corporation may be made by delivering the process to one who, as secretary of the local branch of the organization, is required to receive assessments from members and remit them to the head office, to keep and report the record of the standing of local members, to notify the head office of the death of members and to return the complete proofs of death, such a person being an "agent" of the corporation.

Hildebrand v. United Artisans, 134.

SHOWING AS TO VENUE.

6. A life insurance corporation of M. county having been sued in D. county on one of its policies, a statement in the record that the company "executed and delivered" its policy in D. county, and that the same was accepted in that county, does not show that the assured died there, and thus it does not appear that the cause of action arose in the county of the venue.

Hildebrand v. United Artisans, 134.

VENUE OF ACTION ON LIFE INSURANCE POLICY.

7. Under a statute providing that a corporation may be sued in the county where the cause of action arose, a life insurance company may be sued on its policy in the county whereof its beneficiary was an inhabitant at the time of his death.

Hildebrand v. United Artisans, 134.

LIMITATION—ACCRUAL OF RIGHT OF ACTION.

8. Under a policy requiring the beneficiary to furnish proofs of death and limiting the time for bringing an action on the policy, the cause of action does not accrue until the proofs of death have been received and approved by the insurer.

Stinchcombe v. New York Life Insurance Co. 316.

INTERNAL INJURIES.

As to Heart Trouble and Neuralgia. See DAMAGES, 5,

INTOXICATING LIQUORS.

IMPLIED REPEAL OF STATUTE BY SUBSEQUENT ACT—CONFLICT BETWEEN LOCAL OPTION ACT AND CITY CHARTER.

1. The State local option law (Laws 1905, p. 41, c. 2), authorizing an election on petition to determine whether sale of intoxicating liquors shall be prohibited within any county or subdivision thereof (Sec. 1), providing that, on the result being for prohibition, the county court shall make an order prohibiting the sale (Sec. 10), making it an offense to thereafter sell such liquors within the inhibited territory (Sec. 15), does not supersede a city charter giving the council power to grant licenses and to provide for the revocation thereof, and to regulate and restrain liquor dealers and their places of business, the general act being only a modification of the earlier special municipal act, in that its application is dependent upon a vote for prohibition at an election. Until such an expression of the popular will the charter powers are unchanged.

Sandys v. Williams, 327.

INTOXICATING LIQUORS—EXERCISE OF POLICE POWER.

2. An ordinance forbidding the sale of intoxicating liquors in any room or box connecting with a saloon is not an unreasonable or oppressive restriction, but is an appropriate exercise of the general police power conferred by the city charter. *Sandys v. Williams*, 327.

NATURE OF LOCAL OPTION ACT OF 1904.

3. The local option law adopted by initiative petition at the election in June, 1904, and printed in Laws 1905, p. 41-50, is a general act, which became a law pursuant to proclamation; it did not take effect on other than legislative authority, and it is not a local or a special law as to courts of justice or as to crimes or misdemeanors.

Fouts v. Hood River, 492.

RIGHT TO PASS LOCAL OR SPECIAL LAWS AS TO SALES OF LIQUORS.

4. As Const. Or. Art. IV, § 23, does not prohibit special or local laws concerning the sale of intoxicating liquors, there seems to be no limitation on the power to legislate locally on that subject, so that the local option act adopted in 1904 (Laws 1905, pp. 41-50) is not void because it may operate in only some districts.

Fouts v. Hood River, 492.

COUNTY COURT—DECLARING RESULT OF LOCAL OPTION ELECTION.

5. Under the Local Option Act of 1904 (Laws 1905, pp. 41, 47, c. 2, § 10), after the returns of an election on the question of prohibiting the sale of liquors have been abstracted, and a majority of the votes appear for prohibition, it is the imperative duty of the county court, settling specially under the provisions of this act, to at once make an order declaring the result and forbidding the sale of intoxicating liquors within the prescribed limits.

State ex rel. v. Malheur County Court, 519.

INVITED ERROR.

Availability of Error Brought on by Party Complaining. See **APPEAL**, 10.

JEALOUSY.

Frenzy or Jealous Anger Not Insanity. See **HOMICIDE**, 3, 4.

JUDICIAL NOTICE

Of Proceedings of Voluntary Associations. See **EVIDENCE**, 1.

Of Appointment and Powers of Deputies. See **DIST. ATTS.** 1.

JUDICIAL QUESTION.

Extent and Nature of Use Claimed by Corporation Under Right of Condemnation. See **EMINENT DOMAIN**, 3.

JUDGMENT.**SETTING ASIDE DEFAULT—INADVERTENCE—NEGLECT.**

1. On December 19 the court allowed defendant an extension of time to January 2 to file an answer. No effort was made to do so until January 4, when application was made for a further extension on the ground that it desired to plead a counterclaim, and that the facts were known only to defendant's general manager, whose absence, in consequence of his mother's death, precluded the preparation of such defense, but no attempt was made to excuse the default. Defendant's motion was denied, and judgment entered for plaintiff, whereupon defendant moved to set the same aside, and tendered an answer not alleging a counterclaim, but relying on parts of defendant's by-laws, which were at all times available. Held, that defendant was not entitled to vacation of such judgment on the ground that it was entered by inadvertence, excusable neglect, surprise, mistake or an abuse of discretion. *Nye v. Bill Nye Milling Co.* 303.

FINDINGS AND CONCLUSIONS NOT A JUDGMENT.

2. Under Section 158, B. & C. Comp., requiring that on the trial of an issue of fact by the court, its decision shall be given in writing, stating the facts found and conclusions of law separately, and that they be entered in the journal, and judgment rendered in accordance therewith, the judgment is another order following the entry of the findings, and neither is the equivalent of the other. *State ex rel. v. Guttridge*, 215.

TIME FOR ENTERING JUDGMENT AFTER FILING FINDINGS.

3. It is not error to enter judgment the day after the findings of fact are filed, where no motion for new trial is pending.

Lewis v. First National Bank, 182.

JUDGMENT AS AN ESTOPPEL.

4. The failure of a defendant to present certain facts by cross bill, as an equitable defense to a law action, under Section 391, of B. & C. Comp., whereby a judgment was obtained, does not estop such defendant from subsequently asserting the same facts as a cause of an independent suit to obtain appropriate relief. *Clark v. Hindman*, 67.

JURISDICTION

Of County Courts in Probate—Amount Involved. See COURTS, 1, 2, 3.

JURY.

MISCONDUCT OF JUROR AS GROUND FOR NEW TRIAL.

1. The weight of the testimony in this case shows that the remarks attributed to the prosecuting witness were made by another person, and that the juror did not hear them at all, so manifestly there was neither misconduct by the juror nor any attempt to influence the jury.

State v. Rea, 620.

DETERMINING QUALIFICATION OF JURORS BEFORE TRIAL.

2. If a venireman should falsely state on his voir dire his interest of position, or should misstate or conceal a material relevant fact, he would be guilty of prejudicial misconduct.

State v. Lauth, 342.

BIAS OF JUROR.

3. In an action by a hop merchant against a farmer, a juror who stated that he did not know either of the parties and knew nothing about the case; that it would be hard to say whether in such a litigation he had any sympathy for one as against the other, but that he guessed he was in sympathy with the farmer, because he had had more dealings with farmers; but was quite certain that his verdict would depend on the evidence, is not subject to challenge for actual bias.

Schwartz v. Lee Gon, 219.

ACTUAL BIAS.

4. In a prosecution for murder, a juror who testifies that he was present in court at a former trial, heard part of the testimony, and talked with some of the witnesses, and formed a fixed and positive opinion, which it would require a good deal of evidence to remove, as well as a juror who served at the former trial and witnesses who had testified therein, and who had talked with jurors who served at the former trial and witnesses who had testified therein, and who states that he has formed an opinion which it would require strong testimony to overthrow, is incompetent for actual bias, under B. & C. Comp. §§ 121, 123, defining actual bias, and providing that an opinion shall not of itself be sufficient to sustain a challenge, but that the court must be satisfied from all the circumstances that the juror cannot disregard the evidence and try the issue impartially.

State v. Miller, 485.

JUSTICES OF THE PEACE.

FEES OF JUSTICES ACTING AS COMMITTING MAGISTRATES.

1. Under Section 1583 of B. & C. Comp., declaring justices of the peace to be magistrates, Section 1582, defining the office of magistrate, and Section 3000, fixing the fees of justices, the fees thus prescribed relate to the duties as committing magistrate under Sections 1620-1624, as well as to those of justice, so that a magistrate who has performed the services is entitled to the fees prescribed by Section 3000.

Wallowa County v. Oakes, 33.

EFFECT OF DEFECTIVE TRANSCRIPT ON JURISDICTION OF CIRCUIT COURT.

2. On appeal from a justice's court, the filing of a transcript, though imperfect, with the clerk of the circuit court within the time allowed by law, gives the circuit court jurisdiction.

Woods v. Oregon Short Line Railroad Co. 514.

DEFECTIVE TRANSCRIPT—RIGHT TO RULE TO SUPPLY DIMINISHED RECORD.

3. Where an appeal from a justice's court is taken in good-faith, and the necessary undertaking given and the transcript filed with the clerk of the circuit court within the time allowed by law, appellant is entitled to a rule to compel the justice to amend and correct his certificate so as to show the facts.

Woods v. Oregon Short Line Railroad Co. 514.

LABOR.

Addition of Labor to Confinement as a Sentence. See CRIM. LAW, 7.

LAND BOARD.

Power to Waive Forfeiture—Statutes. See PUBLIC LANDS.

LARCENY.

INDICTMENT—CHARGING SEPARATE OFFENSES.

1. The stealing of articles belonging to several persons at one time and place constitutes only one offense, and may be charged by one indictment, but the allegation must be definite, no presumptions being indulged.

State v. Clark, 140.

INDICTMENT FOR LARCENY FROM DIFFERENT PERSONS.

2. An indictment alleging that defendants on a certain date "then and there being, and acting together, did then and there * * feloniously take, steal and carry away" several chattels belonging to two different persons, sufficiently alleges that the articles were taken at the same time and place.

State v. Clark, 140.

LARCENY FROM THE PERSON—ASSAULT—LESSER OFFENSE.

3. Under an information charging an attempt at larceny from the person by assaulting and pocket picking a conviction of simple assault is permissible, under Section 1418 of B. & C. Comp. Whether an assault is necessarily included in an attempt at larceny from the person is not decided.

State v. Houghton, 12.

PUNISHING LARCENY BY CONFINEMENT WITH HARD LABOR.

4. Under a statute prescribing a penalty of imprisonment in jail (such as Section 1772, B. & C. Comp.), a further condemnation to hard labor is illegal.

State v. Houghton, 12.

LAWS OF OREGON.

For Compiled Laws see STATUTES OF OREGON.

For Uncompiled Laws see SESSION LAWS OF OREGON.

LEGISLATIVE QUESTION.

Necessity of Right of Condemnation. See EMINENT DOMAIN, 3.

LESSER OFFENSE.

Inclusion of Within Larger Crime—Attempted Larceny by Assault—Simple Assault. See **LARCENY**, 3, 4.

LICENSE.

Revocation of After Being Acted Upon. See **ESTOPPEL**, 2, 3.

LIENS.

Miners' Liens—Parties to Foreclosure—Description of Property—Priority Over Lease—Statement of Amount Due. See **MINES**, 1-5.

Liens on Structures—Posting Notice by Owner—What Is a Conspicuous Place. See **MECHANIC'S LIENS**.

Loss of Attachment Lien by Omitting Order of Sale. See **ATTACHMENT**.

LIFE INSURANCE. See **INSURANCE**.

LIMITATION OF ACTIONS.

LIMITATIONS—BURDEN OF PROOF—EXCEPTION TO RULE.

1. While it is a general rule that a party pleading the statute of limitations has the burden of proving his claim, there is an exception where the complaint shows that the cause of action would be barred but for certain facts that are stated. In such a case the defendant does not have the burden of proving a defense of limitations, though pleaded, but the plaintiff must prove his allegations, including the special facts relied upon to avoid the statute. Therefore a charge that the defendant, having pleaded the statute of limitations, must establish such defense by a preponderance of proof is not always correct, and in this case it was error.

Scott v. Christenson, 417.

RIGHT OF FIRST MORTGAGEE TO PLEAD STATUTE OF LIMITATIONS AGAINST SUIT BY SECOND MORTGAGEE ON HIS MORTGAGE.

2. Where a first mortgagee sued to foreclose, and joined the holder of a second mortgage as a party, and the latter did not contest plaintiff's claim nor his right of priority, but filed a cross-complaint for foreclosure of his mortgage as a subsequent lien, there was no privity between plaintiff and such second mortgagee sufficient to entitle plaintiff to plead the statute of limitations to the latter's mortgage.

Tinsley v. Lombard, 9.

EXECUTORS—LIMITATIONS—RIGHT TO SUE ON REJECTED CLAIM.

3. A claim against an estate not being suable for six months from the appointment of a personal representative (B. & C. Comp. § 387), and not thereafter until it has been rejected, or a reasonable time allowed for so doing (B. & C. Comp. § 388), the statute of limitations is suspended during the time that a claim filed for allowance is being held without being rejected or allowed, and remains suspended until the personal representative acts on the claim.

Morgan's Estate, 233.

PLEADING STATUTE OF LIMITATIONS.

4. A claim under the statute of limitations is an affirmative defense, and must be specially pleaded, unless it is apparent from the face of the complaint that the cause of action is barred.

Scott v. Christenson, 417.

See, also, **INSURANCE**, 8; **WATERS**, 6.

LOCAL LAWS.

Regulating Sales of Liquors. See **STATUTES**, 3.

Local Option Law of 1905 Not a Local Act as to Crimes and Misdemeanors or Practice in Courts. See **STATUTES**, 4.

LOCAL OPTION.

Effect of Local Option Act on City Charters. See STATUTES, 8.

Act of 1904 Is a General Law Subject to Be Applied Locally by Popular Vote in Districts. See STATUTES, 1.

Not a Local Act for Punishing Crime. See STATUTES, 4.

Not a Special Act for Regulating Practice in Courts. See STATUTES, 4.

LOCATING COUNTY ROAD.

Confirmation of Report of Viewers—Adequacy of Damages—Contents of Petition—Duty of Viewers in Locating Road. See HIGHW'S, 1, 2, 3.

LONG ACCOUNTS. See EQUITY, 1.

MANDAMUS.

PRECEDENT CONDITIONS TO ISSUANCE OF THE WRIT.

1. To authorize the issuance of a writ of mandamus, the petitioner must show first, a legal right in himself to have the act done which is sought by the writ; and, second, that it is the plain legal duty of defendant to perform the act, without discretion to do or refuse it.

State ex rel. v. Malheur County Court, 519.

MANDAMUS TO COUNTY COURT TO PROHIBIT SALE OF LIQUORS UNDER LOCAL OPTION LAW—PLEADING.

2. A writ of mandamus directing a county court to make an order declaring the result of an election and prohibiting the sale of intoxicating liquors in a certain district, should show specifically that all the conditions legally required for such an order have been fulfilled, as, for instance, that a petition of the required per cent of qualified voters was properly filed, and that the election was ordered and was held in pursuance of such order.

State ex rel. v. Malheur County Court, 519.

CONSTRUCTION OF WRIT ON DEMURRER.

3. A demurrer to an alternative writ of mandamus is a convenient means of testing its sufficiency, and the writ will be construed against the pleader when so tested.

State ex rel. v. Malheur County Court, 519.

Complaint—Allegations of Fact. See PLEADING, 4.

MANDATE.

Authority to Direct Special Judgment on Reversal. See COURTS, 4.

MARRIED WOMEN.

Contracts of With Husband Relating to Curtesy. See HUS. & WIFE, 1.

MASTER AND SERVANT.

INJURY—FAILURE TO RECALL DANGER—CONTRIBUTORY NEGLIGENCE.

1. Where a servant is suddenly called upon to perform a service requiring prompt and energetic action he cannot as a matter of law be charged with contributory negligence in failing to remember a defect in the machinery he must handle, or a particular danger connected with the work, even though he may previously have known of them.

Viohl v. North Pacific Lumber Co. 297.

IDEM.

2. The fact that a servant has knowledge of a danger is not conclusive of negligence in failing to avoid it, but that fact imports negligence only when the danger was of such a character that a man of ordinary prudence and caution would have refused to incur it in the performance of his duties.

Viohl v. North Pacific Lumber Co. 297.

MASTER AND SERVANT—SUPERINTENDENT.

3. A person employed in a laundry to oversee a mangle and direct the movements of the other persons employed at the machine is not, as a

matter of law, a foreman or superintendent, charged with the duty of keeping the machine and its surroundings in proper condition.

Busch v. Robinson, 539.

INJURY TO SERVANT—EVIDENCE—QUESTION FOR JURY.

4. The evidence in this case on all the questions involved was sufficient to require its submission to the jury, so that the motion for a directed verdict was properly refused.

Busch v. Robinson, 539.

Complaint—Inference as to Risk. See **PLEADING**, 3.

MEASURE OF DAMAGES.

In Case of Refusing to Convey Land as Agreed. See **VEND. & PUR.**

MECHANIC'S LIENS.

EVIDENCE OF POSTING NOTICE BY OWNER.

1. The evidence in this case shows a posting of a notice on the house in the repair of which the labor and material in question were furnished, to the effect that defendant would not be responsible for the labor and material.

Marshall v. Cardinell, 410.

NOTICE OF NONLIABILITY BY OWNER—CONSPICUOUS PLACE.

2. A notice posted on the front of a building on a public street, in such a position as to be readily observed by persons entering the building both by the stairway and on the first floor, is in a "conspicuous place," within B. & C. Comp. § 5643, providing that a property owner may be relieved of liability for liens by posting a certain notice.

Marshall v. Cardinell, 410.

PRESUMPTION CONCERNING POSTED NOTICE.

3. Where a notice under B. & C. Comp. § 5643, that the owner of a building will not be liable for repairs thereon, is posted in good faith by the owner, a presumption arises that it remained a sufficient length of time to impart knowledge to the persons it was intended to affect.

Marshall v. Cardinell, 410.

MEDICINE.

Action for Damages for Poor Surgery. See **PHYSICIANS & SURGEONS.**

MEMORANDUM.

Competency of as Evidence—Knowledge of Witness—Use of to Refresh Memory—Copies of Originals. See **EVIDENCE**, 6-12.

MENTAL SUFFERING

Is Sometimes a Proper Element of Damage. See **DAMAGES**, 2.

MINES AND MINERALS.

MINERS' LIENS—PROPER AND NECESSARY PARTIES.

1. Under B. & C. Comp. § 5668, making lessors of mining property, though worked by lessees, liable for the claims of miners, unless a copy of the lease is recorded in the mine records in the proper county, and Section 5672, requiring persons personally liable for the payment of the claims of miners to be made parties to a suit to foreclose a lien on the mine, the lessees are proper though not necessary parties. The statute is for the benefit of the owner, and he may expressly or impliedly waive his right to have the lessee brought in, as, by not so demanding at the proper time.

Lewis v. Beeman, 311.

MINERS' LIENS—DESCRIPTION OF PROPERTY.

2. In a suit to foreclose miners' liens, no issue being raised as to the identity of the property in question, it is not necessary to introduce in evidence the record of mining claims referred to in the lease of the property

given by defendants and in the notice of lien, nor certified copies of the mining journals of the county relating to the property, but a sufficiently certain decree can be rendered by referring to the volume and page of the records in question, as specified in the lease and notice of lien.

Lewis v. Beeman, 311.

MINERS' LIENS—BURDEN OF PROOF AS TO PAYMENTS.

3. In a suit to subject leased property to the satisfaction of miners' liens arising out of debts contracted by the lessee, the burden is on the lien claimants to show, as against the owners, that no payments have been made on account of their liens since they were filed.

Lewis v. Beeman, 311.

PRIORITY OF LEASE OVER LIENS.

4. Under the express provisions of B. & C. Comp. § 5668, no lien can be enforced against mining property for labor performed for the lessee where the lease was recorded before the work was begun.

Lewis v. Beeman, 311.

MINERS' LIEN—STATEMENT OF AMOUNT DUE.

5. Under Section 5669, B. & C. Comp., relating to liens against mining claims, which requires a claimant to file a "true statement of his demand after deducting all just credits," a statement not giving a credit for a conceded payment is fatally defective, even though the credit be unimportant in amount.

Lewis v. Beeman, 311.

MISCONDUCT.

Acts of Juryman as Ground for New Trial. See JURY, 1.

MISTAKE.

Reinstating Lien Canceled by Mistake. See MORTGAGES, 2.

Opening Default for Excusable Oversight. See JUDGMENT, 1.

MONEY RECEIVED.

ACTION FOR PRICE PAID AS MONEY HAD AND RECEIVED.

Upon a refusal by a vendor to comply with his contract to sell and convey, the purchaser may also rescind and maintain an action for the purchase money already paid.

Maffet v. Oregon & California Railroad Co. 443.

MORTGAGES.

REPRESENTATIONS BY MORTGAGOR—EFFECT ON MORTGAGEE.

1. Representations of a mortgagor to his creditors, made in the absence of the mortgagee, and without his knowledge that the mortgage debt had been paid, are not binding on the mortgagee.

Smith v. Leavenworth, 463.

REINSTATEMENT OF MORTGAGE LIEN CANCELED BY MISTAKE.

2. Equity will enforce an agreement between a mortgagee who has foreclosed his mortgage and bought in the property with one who is to provide means to pay the debt, that the judgment and the lien shall be assigned to the lender as his security for the money, where by mistake the land was redeemed from the sale and the lien canceled.

Burton v. Anthony, 47.

Construction of Power to Mortgage. See PRINCIPAL & AGENT, 5.

Effect of Mortgage on Interest by Entirety. See HUSBAND & WIFE, 3.

Right of First Mortgagee to Plead Limitations Against Second Mortgagee in Foreclosure Suit. See LIM. OF ACTIONS, 2.

MOTION.

Waiving Motion to Strike Out by Answering. See PLEADING, 17.

MUNICIPAL CHARTERS. Same as **CHARTERS OF CITIES.**

MUNICIPAL CORPORATIONS.

CONSTRUCTION OF CITY CHARTER LIMITING INDEBTEDNESS.

1. A distinction exists between the restriction of a constitution or charter, prohibiting a municipality from "creating" an indebtedness in excess of a stated amount and one providing that the indebtedness "must never exceed" a stated amount, the latter not admitting of any exceptions except liabilities arising from tort. *Brookway v. Roseburg, 77.*

CITY CHARTER—CONTRACT TO PAY IN "VALID WARRANTS."

2. A contract to pay an obligation in "valid warrants" is a contract to pay from the general revenues of the municipality, unless there is an agreement to look to some special fund, and the amount to be paid is an indebtedness within the meaning of a provision that the debts and liabilities "must never exceed" a stated sum. *Brockway v. Roseburg, 77.*

EQUITY—ENJOINING MUNICIPALITIES.

3. Equity will restrain the action of municipal corporations attempting to proceed beyond their delegated powers. *Sandys v. Williams, 327.*

EFFECT OF LOCAL OPTION ACT ON CITY CHARTER.

4. The local option law (Laws 1905, p. 41, c. 2) does not repeal or modify provisions in earlier city charters giving councils control over the sale of liquors. Until prohibition is put in force by an election and proclamation the charter provisions remain unaffected. *Sandys v. Williams, 327.*

INTOXICATING LIQUORS—EXERCISE OF POLICE POWER.

5. An ordinance forbidding the sale of intoxicating liquors in any room or box connecting with a saloon is not an unreasonable or oppressive restriction, but is an appropriate exercise of the general police power conferred by the city charter. *Sandys v. Williams, 327.*

POWER OF CITY TO LICENSE POOL ROOM—CONSTRUCTION OF CHARTER.

6. A city which by its charter is authorized to prevent and suppress gaming and gambling houses is not authorized to make such places lawful by licensing them. *State v. Nease, 433.*

NAVIGABLE WATERS.

TIDE LAND—NATURE OF GROUND.

1. A strip of sandy soil varying from ten inches to ten feet in width and a mile long lying at the foot of a steep bank, and about half the time entirely submerged, though at other times uncovered at ebb tide, is not tide or overflowed land. *Sengstacken v. McCormac, 171.*

ESTOPPEL BY RECITALS IN DEEDS.

2. A claimant of the right to approach and use deep water fronting his upland is not estopped to dispute the character of certain land claimed to be tide land, and which he must cross, by a reference thereto as such in some of his title deeds, where it is apparent that such reference was not intended as an admission or statement as to the character of the land, but was added as a matter of precaution. *Sengstacken v. McCormac, 171.*

NEGLECT

As Reason for Setting Aside Default. See **JUDGMENT, 1.**

NEGLIGENCE.

Act of Passenger in Exercising in Dark Place. See **CARRIERS, 7.**

Assumed Risk of Work Hired to Be Done. See **BAILEMENT.**

Effect of Forgetting Known Danger. See **MASTER & SERVANT, 1, 2.**

NEGOTIABLE INSTRUMENTS. Same as BILLS & NOTES.**NEW TRIAL.****QUALIFICATION OF JUROR AFTER TRIAL.**

1. The conclusion by the trial judge as to the qualifications of a juror, when attacked by a motion for a new trial, will be set aside only when there has been an abuse of discretion. *State v. Lauth, 342.*

EXAMPLE OF DISCRETION—QUALIFICATION OF JUROR.

2. On a prosecution for murder, defendant moved for a new trial on the ground that a juror had made false answers, in that he had stated that he had never heard anything about the case. Defendant produced an affidavit that affiant, shortly after the coroner's inquest, met the juror in question, and talked with him, and told him all about the crime; and another affidavit stated that the juror admitted to affiant, in the presence of the one who had made the first affidavit, that the juror had talked with the latter about the case prior to the trial. The affidavit of the juror stated that he had no recollection of having ever talked with any one about the crime, and that he had never admitted that he had done so; and another affidavit, made by the one who made the first-mentioned affidavit, stated that the juror never admitted in his presence that he had ever talked about the case. *Held*, that it was not an abuse of discretion to deny the new trial. *State v. Lauth, 342.*

EFFECT OF FILING COST BILL PREMATURELY ON NEW TRIAL.

3. If a judgment was prematurely entered, because entered the last day of term—the same day the findings were filed—it did not deprive a party of his right to file a motion for a new trial. *Jennings v. Frasier, 470.*

NONSUIT.

Considering Effect of Evidence on Motion For. See TRIAL, 3.

NOTES. Same as BILLS AND NOTES.**NOTICE.**

Effect of Deed Conferring Easement. See VENDOR & PURCHASER, 7.

Contract of Sale—After Waiving Forfeiture. See VEND. & PUR. 10.

NUISANCE.**MAINTAINING POOL ROOM.**

Under B. & C. Comp. § 1930, providing for the punishment of persons who willfully and wrongfully commit any act which grossly disturbs the public peace or health, or which openly outrages the public decency, and is injurious to the public morals, it is not necessary, to constitute the offense, that there should be an actual breach or disturbance of the peace, or actual or threatened violence, but any immoral or criminal act which disturbs the quiet and tranquility of society, to the injury of public order and decorum, or disturbs or threatens the public peace, and which would constitute a nuisance at common law, is within the statute, as, for example, maintaining a gambling house or pool room. *State v. Nease, 433.*

OFFICERS.**PAROL EVIDENCE OF ACCEPTANCE OF BONDS.**

1. The official record is the best evidence as to the acceptance and approval of the bond of a public officer, yet on proper occasions the facts may be shown by parol. *Baker County v. Huntington, 275.*

SUSPICIOUS CIRCUMSTANCES APPARENT ON AN OFFICIAL BOND.

2. Where it appeared on the face of an official bond tendered for approval that the officer's name was not written in as the principal, that the

name of only one of the six sureties who signed the instrument appeared in the body thereof, that the total of the amounts written after the names of the different sureties was only \$7,000, whereas the requirement was a bond of \$10,000, and two of the signing sureties had not justified, a reasonably prudent man would have inquired, and therefore the county was chargeable with constructive knowledge as to the authority of the officer to deliver the bond.
Baker County v. Huntington, 275.

IDEM.

3. In order that a defect on the face of an official bond shall operate as notice to the obligee of a condition affecting the right of the principal to deliver it, the defect must be one reasonably tending to cause a discovery of the real defect, otherwise there will not be imputed notice.
Baker County v. Huntington, 275.

EFFECT OF ACTS OF DEPUTIES.

4. The filing of an information by a deputy district attorney is in effect the act of the principal officer himself. *State v. Guglielmo*, 250.
See **PRINCIPAL AND SURETY**, 2, 3; **SHERIFFS**, 1, 2.

OPENING DEFAULT.

Inadvertence—Surprise—Excusable Neglect. See **JUDGMENT**, 1.

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OREGON CONSTITUTION. Same as CONSTITUTION OF OREGON.

OREGON STATUTES. Same as STATUTES OF OREGON.

OTHER CRIMES.

Showing Other Offenses When Not Incidental. See CRIM. LAW, 2.

OVERFLOWED LAND.

Description of Overflowed Land Not Swamp. See PUBLIC LANDS, 4.

OVERFLOWING LAND.

Construction of License to Maintain a Dam. See WATERS, 10.

PARENT AND CHILD.

AVOIDING DEED FOR FRAUD—RELATIONSHIP OF PARTIES.

A deed from a parent to a child is not void merely because of the relationship of the parties. *Powers v. Powers*, 479.

PAROL AGREEMENT.

Enforcement of After Part Performance. See p. 590.

PAROL EVIDENCE

To Vary Indorsement on Note. See BILLS & NOTES, 10.

Of Acceptance of Sheriff's Bond. See SHERIFFS & CONSTABLES, 1, 2.

Of Oral Agreement Collateral to Writing. See EVIDENCE, 15.
Affecting Terms or Purpose of Writings. See EVIDENCE, 16-18.
Of Meaning of Peculiar Terms. See EVIDENCE, 19.

PARTIES.

INDORSE AS REAL PARTY IN INTEREST.

1. An indorsee of a negotiable note for collection is the real party in interest in the sense that he may maintain an action on the paper in his own name: B. & C. Comp. § 27. *Smith v. Bayer*, 143.

WAIVER OF OBJECTION OF DEFECT OF PARTIES.

2. An objection because of defect of parties must be made at the first opportunity after the facts become known to the opposing party, or it will be waived; for example, when the defect first became known through the cross-examination of plaintiff, the objection was waived by waiting until after the return of the verdict to suggest it. *Young v. Stickney*, 101.
See, also, MINNES, 1.

PARTNERSHIP.

INDORSEMENT OF PAPER PAYABLE TO FIRM NAME.

Negotiable paper drawn to a firm name, or a business name, may be endorsed by the person who is doing business under that name. *Gardner v. Wiley*, 96.

PART PERFORMANCE.

Effect of Part Performance of Oral Contract. See p. 590.

PASSENGERS.

Rights at Station Before and After Train Time—Duty of Carrier to Light Platforms—Walking on Dark Platform. See CARRIERS, 1, 8.

PAUPERS.

Power to Compel Support of by Relatives. See COUNTIES, 4.

PAYMENTS.

COMPETENT EVIDENCE OF RATIFICATION.

Where plaintiff testified that he wrote defendant a letter, which was mailed to him in the ordinary course of the mail, informing him that plaintiff had credited a certain sum due defendant as a payment on his note to plaintiff, such evidence being sufficient to raise a presumption that the letter was received, as provided by B. & C. Comp. § 788, subd. 24, it should have been submitted to the jury as bearing on the inquiry whether defendant had ratified plaintiff's appropriation of his money in part payment of the note. *Sloan v. Sloan*, 36.

PERSONAL INJURIES. See CARRIERS, and MASTER & SERVANT.

PHOTOGRAPHS as Evidence. See EVIDENCE, 20.

PHRASES. Same as WORDS & PHRASES.

PHYSICIANS AND SURGEONS.

SCOPE OF CROSS-EXAMINATION.

1. In an action against a physician for injuries to plaintiff, owing to negligent treatment of his fractured arm, a physician having been asked on his examination in chief if there was not an X-ray machine in the city where plaintiff was treated, and he having answered that a certain physician had one, it was not improper cross-examination to inquire whether it was usual in that locality for surgeons to have such appliances. *Beadle v. Paine*, 424.

MALPRACTICE—TESTING KNOWLEDGE OF WITNESS.

2. An expert witness having testified to some general surgical propositions, and that a specified treatise was a standard authority, it was not improper cross-examination to ask the witness if that work did not contain statements contradictory of his testimony. *Beadle v. Paine*, 424.

INSTRUCTION AS TO DEGREE OF SKILL REQUIRED OF SPECIALISTS.

3. The court instructed that a physician or surgeon making a specialty of the practice of surgery is not bound to use any greater skill, care or diligence in the treatment of the case than a specialist in the same general locality in which such physician or surgeon resides and practices his profession. *Held*, that while the instruction might properly have called for such skill, care and diligence as were observed in like or similar localities, there was no error in omitting to do so, the court having in previous instructions explicitly informed the jury that the degree of skill required would be that possessed by the average members of the profession practicing as specialists in similar localities, regard being had to the advanced state of medical science. *Beadle v. Paine*, 424.

INSTRUCTION—REPEATING QUALIFYING EXPRESSIONS.

4. For instance, where, in an action for malpractice of surgery, the court gave instructions as to the degree of skill that should be observed by persons holding themselves out as specialists in the practice of surgery, it was not necessary to make reference to specialists in giving an instruction to the effect that it was not negligence for defendant not to have an X-ray machine unless it was usually employed by physicians and surgeons in that locality. *Beadle v. Paine*, 424.

MALPRACTICE—NEGLECT OF PATIENT.

5. In an action for malpractice of surgery, where the defendant is charged with negligence or nonobservance of proper care, or want of skill, it is a good defense that the patient was negligent at the time, which conduced or contributed to produce the injury complained of, but it will not suffice to defeat the action that the injured party was subsequently negligent, and thereby conduced to the aggravation of the injury primarily sustained, though this later negligence of the patient may be shown in mitigation of damages. *Beadle v. Paine*, 424.

INSTRUCTIONS AS TO CARE BY PATIENT.

6. In an action for injuries to plaintiff owing to the negligence of defendant in treating plaintiff's fractured arm, the court instructed that if plaintiff, after having been treated for some time by defendant, was told by defendant to return for further treatment, and was instructed in the proper care and use of his arm, and he failed to return for treatment and used his arm in a different manner, the jury might take such facts into consideration in determining whether the plaintiff was negligent. *Held*, that the instruction was not erroneous. *Beadle v. Paine*, 424.

Fees of as Element of Damages. See DAMAGES, 1.

PLATFORMS.

Right to Exercise in Dark—Risk of Injury. See CARRIERS, 7.

Duty to Light Stations at Reasonable Times. See CARRIERS, 2-4.

PLEADING.**ALLEGATIONS AND PROOFS MUST CORRESPOND.**

1. The allegations of a pleading cannot be abandoned on a trial and some other defense substituted not stated in the pleadings. For example, under an answer to a mortgage foreclosure suit that part of the principal

was a judgment fraudulently confessed by plaintiff as defendant's attorney, it is not competent to show that part of the principal was usurious charges for loans and extensions of time, as the testimony does not tend to support the pleading. *Thayer v. Buchanan*, 106.

PLEADING SEPARATE CAUSES OF ACTION.

2. Separate rights of action must always be separately stated, while separate statements of a single right may or may not be allowed, as the occasion may require. *Harvey v. Southern Pacific Co.* 505.

COMPLAINT—INFERENCE OF RISK ASSUMED.

3. In an action by a servant for personal injuries, a complaint showing that a board in a platform on which plaintiff was compelled to stand while feeding a mangle in a laundry had been negligently allowed to become smooth and broken, so that while in the performance of her duty she slipped and fell forward, whereby her hand was caught between the rollers of the machine, is not insufficient on the ground that plaintiff must from the facts stated necessarily have known of the defect, and thereby have assumed the risk involved. *Busch v. Robinson*, 539.

PLEADING CONCLUSIONS.

4. Where a matter is collateral to the essential act involved, it is usually sufficient to allege it generally, as, that a certain election was duly held, or that one purporting to be a public officer was duly elected; but that will not do when the existence of the ultimate fact is the very question in dispute, then the basic facts must be set forth in detail.

State ex rel. v. Malheur County Court, 519.

DENYING MATTER OF INDUCEMENT.

5. Matters of inducement in a pleading are not material, and need not be denied. *Fleishman v. Meyer*, 267.

EFFECT OF DENYING MATTER NOT ALLEGED.

6. A denial of a statement not pleaded does not raise an issue, and no evidence should be permitted in support of it. *Brown v. Feldwert*, 363.

EFFECT OF DENYING ADMITTED ALLEGATIONS.

7. A denial of an allegation of fact already admitted is not a denial at all—the pleading is controlled by the admission.

Brown v. Feldwert, 363.

AMENDING PLEADINGS AFTER REVERSAL IS DISCRETIONARY.

8. Under B. & C. Comp. § 102, providing that the court, at any time before trial, and on such terms as may be proper, may allow any pleading to be amended, it is not an abuse of discretion, after reversal of a judgment, to permit plaintiff to amend his complaint, without imposing as a condition the payment of costs and disbursements incurred by defendant on the former trial and appeal, which were made a valid charge against plaintiff by Section 563.

Nye v. Bill Nye Milling Co. 302.

AMENDMENTS ARE DISCRETIONARY.

9. An application for leave to amend a pleading is addressed to the discretion of the trial court, and that discretion seems not to have been unjustly exercised in this instance.

Brown v. Feldwert, 363.

MOTION TO COMPEL ELECTION.

10. A motion to require a party to elect which cause of action will be pursued may be made after an appeal from a justice's court and at any time before the examination of witnesses begins.

Harvey v. Southern Pacific Co. 505.

WAIVING RIGHT TO DEMAND ELECTION OF COUNTS.

11. After replying to an answer containing several defenses, plaintiff cannot at the trial ask that defendant elect on which defense he will rely.

Fleishman v. Meyer, 267.

REQUEST TO PLEAD AS A WAIVER OF A PRIOR PLEADING.

12. A request for time to plead is an abandonment of a pleading already filed, and the case then stands as though the prior plea had not been filed.

Nye v. Bill Nye Milling Co. 302.

WAIVING GENERAL DEMURRER BY ANSWERING.

13. Under the Oregon practice the objection that a cause of action is not stated in the complaint is not waived by answering: B. & C. Comp. § 72.

David v. Moore, 148.

WAIVER—EFFECT OF PLEADING OVER ON DEFECTIVE ALLEGATIONS.

14. An objection to a defective statement of a cause of action or defense is waived by pleading over; but the objection may be renewed on appeal if the statement is so insufficient that no cause at all is stated.

Brown v. Feldwert, 363; *Hayes v. Horton*, 597.

WAIVER OF MATTER IN ABATEMENT BY ANSWERING.

15. The objection that a claim against a decedent's estate was not presented by the proper person is a matter in abatement only, and is waived by joining issue on the merits.

Morgan's Estate, 233.

WAIVER OF MOTION TO STRIKE OUT.

16. An objection to an answer because it contains several defenses not separately stated must be made by a motion to strike, under Section 81, B. & C. Comp., or it will be considered as waived, and cannot afterward be urged.

Fleishman v. Meyer, 267.

IDEM.

17. A motion to strike out a complaint must be made before answering, under Section 81 of B. & C. Comp., and is therefore waived by pleading over.

Harvey v. Southern Pacific Co. 505.

See **BILLS AND NOTES**, 7, 13-15; **BRIDGES**, 1, 3; **CONTRACTS**, 9; **FRAUD**, 1, 7; **LIMITATION OF ACTIONS**, 2, 4; **RAILROADS**, 3.

PLEADINGS AND PROOFS.

See **DAMAGES**, 4, 5; **BRIDGES**, 3; **RAILROADS**, 3.

POLICE POWER.

Regulating Sales of Intoxicants in Small Rooms. See **MUNIC. CORP.** 5.

POOL ROOM.

Social Position of at Common Law—Nuisance. See **GAMING**, 1.

Peace Disturber in Modern Society—Statute. See **NUISANCE**.

Effect of License Issued to by City—Charter. See **MUNIC. CORP.** 6.

PORTLAND CHARTER. See **CHARTERS OF CITIES**.**PRACTICE IN SUPREME COURT.**

Remanding With Direction to Impose Proper Sentence. See **COURTS**, 4.

Affirming Final Order Entered on Demurrer. See **COURTS**, 5.

PREFERENCES, by Insolvent.

Who May Avoid Transfers by the Debtor. See **BANKRUPTCY**, 1, 2.

PRESUMPTION

As to Effect of Submitting False Issue. See **APPEAL**, 12.

Of Continued Possession of Money. See **EXECUTION**, 1.

As to How Long Posted Notice Remained. See **MECHANIC'S LIENS**, 3.
As to Resulting Trust—Deed to Husband and Wife. See **TRUSTS**, 2.

PRINCIPAL AND AGENT.

COMPETENT EVIDENCE OF AGENCY.

1. An agent's authority cannot be proved by his own statements that he is such agent, and before the acts of the agent can be shown at all against the principal, the agency must be shown. *Sloan v. Sloan*, 36.

AUTHORITY OF AGENT—QUESTIONS OF LAW AND FACT.

2. The appointment or authority of an agent is a question of fact, but what he may do by virtue thereof is a question of law. When the appointment and authority are admitted the court may declare whether they empower the agent to perform the particular act in question, but when there is a dispute as to the appointment or authority conferred, the fact of such appointment or authority must be found by the trier of fact.

Neppach v. Oregon & California Railroad Co. 374.

EVIDENCE AS TO SCOPE OF AGENCY.

3. One who is held out by a railroad company as its authorized land agent, and who transacts its entire business in relation to the acquisition, sale and disposition of lands, may bind the company by a contract extending the time for payment by a purchaser of lands, or waiving a strict compliance with the provisions of the contract in that regard.

Neppach v. Oregon & California Railroad Co. 374.

ESTOPPEL BY REPRESENTATION AS TO AUTHORITY.

4. Under the general law of estoppel an employer who permits his employee to sell goods as though he were an independent dealer, holding him out to the public as such, will not be permitted to deny his apparent position as against those who have dealt with him without notice of the facts and in good faith.

Gardner v. Wiley, 96.

CONSTRUCTION OF POWER OF ATTORNEY TO MORTGAGE—RATIFICATION.

5. A power of attorney authorizing the agent to borrow money and secure the repayment thereof by mortgaging specified property in the hands of a receiver, but which the principals had arranged to buy, is broad enough to sustain a mortgage given for not only the purchase price but for money necessary to clear away outstanding liens against the title, it being evidently the intention of the principals to procure an unincumbered title, and the report of the agent having been promptly submitted and received without objection.

Curtze v. Iron Dyke Mining Co. 601.

PRINCIPAL AND SURETY.

SEPARATE LIABILITY OF PRINCIPAL AND SURETIES THROUGH FAILURE OF PRINCIPAL TO SIGN THE BOND.

1. The sureties who have signed an official bond may render themselves liable though the principal has not signed the obligation.

Baker County v. Huntington, 275.

OFFICIAL BONDS—DELIVERY WITHOUT CONSENT OF SURETIES.

2. Sureties upon an official bond regular upon its face, who, after affixing their signatures thereto, give it into the possession and control of the principal, clothe him with apparent authority to make final delivery to the obligee or proper authorities; and, if the principal delivers it contrary to an understanding with the sureties that it shall not be delivered until other persons shall have become obligated, the sureties are estopped to deny the validity of the bond, unless the obligee has accepted it with notice, actual or constructive, of the real conditions under which it was intrusted to the principal.

Baker County v. Huntington, 275.

DELIVERY OF OFFICIAL BOND—SUSPICIOUS CIRCUMSTANCES.

3. Where the obligee of an official bond knows of, or has notice sufficient to put a reasonably prudent man upon inquiry concerning, a violation of the condition under which it was delivered to the principal for final delivery, he cannot enforce it against the sureties.

Baker County v. Huntington, 275.

DEFECTIVE BONDS—PLEADING WANT OF AUTHORITY TO DELIVER.

4. An official bond fair on its face does not import notice of any agreement between the sureties and the principal concerning the delivery of such bond, and a defense based on such an agreement must be pleaded; but where the bond by its appearance puts the obligee on notice as to the authority to deliver, a defense of want of such authority need not be specially pleaded by the sureties.

Baker County v. Huntington, 275.

PRIVATE ROADS.

Public Roads to Private Residences. See **HIGHWAYS.**

PRIVILEGES.

Equal Rights to All Citizens on Equal Terms. See **CONST. LAW, 4.**

PROBATE.

Jurisdiction Over Probate Proceedings. See **COURTS, 1, 2.**

Presentation and Allowance of Claims. See **EXECUTORS, 1, 2.**

Limitation on Suit on Rejected Claim. See **LIMITATION OF ACTIONS, 3.**

PROCESS.

Service of on Resident Agent. See **CORPORATIONS, 3.**

Return of Service on Agent—Sufficiency. See **CORPORATIONS, 5.**

PROOFS OF DEATH.

Time Allowed for Furnishing to Company. See **INSURANCE, 3.**

Effect of Retaining Without Objection. See **INSURANCE, 4.**

PROSECUTING ATTORNEYS. Same as DISTRICT ATTORNEYS.**PUBLIC LANDS.****POWER OF STATE LAND BOARD TO WAIVE FORFEITURE.**

1. The State Land Board has the power to waive a forfeiture imposed by law for the nonpayment of installments on the purchase price of public land.

Schlbrede v. State Land Board, 615.

FORFEITURE UNDER STATUTE OF 1878 FOR DEFAULT.

2. Where one, on giving notes for the balance of the price of public lands, receives a certificate of sale, entitling him to a deed on payment of the notes, according to their tenor, but containing the provision of Laws 1878, p. 47, that, if any interest on the notes shall remain unpaid for a year after it is due, the certificate shall be void, and all payments shall be forfeited, and the land shall be deemed vacant and shall be subject to sale as if it had not been sold, such a default in payment of interest ipso facto forfeits the contract of purchase, and all rights of the purchaser thereunder.

Schlbrede v. State Land Board, 615.

WAIVER OF FORFEITURE BY ACT OF 1899.

3. Laws 1899, p. 77, § 5, providing that the holder of a certificate of sale of public lands theretofore issued may pay up arrears of interest within six months of the date of the act, and that all forfeitures of the certificate are suspended for such period, waives a forfeiture of the certificate only so far as one exists at the date of the act for default in payment of interest, and does not waive a forfeiture for default in payment of interest thereafter accruing.

Schlbrede v. State Land Board, 615.

QUESTION FOR JURY.

Effect of Conflicting Evidence. See TRIAL, 4.

Terms of Contract Orally Made. See CONTRACTS, 3.

QUESTION OF FACT. See PRINCIPAL & AGENT, 3.

QUESTION OF LAW. See PRINCIPAL & AGENT, 3.

QUIETING TITLE.

RIGHT OF ACTION—SUIT TO CANCEL DECREE.

1. Plaintiff executed as surety a note, which was delivered to defendant, but plaintiff gained possession of the mortgage given by the principals to secure the note. The mortgage was assigned by the plaintiff on defendant's agreeing to indemnify the plaintiff against the payment of the note. The note and mortgage fell into the hands of a bona fide holder, who sued the plaintiff and the principals in the note and mortgage, and obtained a decree of foreclosure. Subsequently the holder of the decree assigned it, partially unsatisfied, to the defendant, who was not a party to the foreclosure proceeding. *Held*, that plaintiff was entitled to sue to cancel the decree in the hands of defendant, as a cloud on plaintiff's title and to enjoin its enforcement.

Smith v. Nelson, 1.

FACTS BEFORE THE COURT.

2. In a suit to cancel a decree against plaintiff for the amount due on a note, as a cloud on the title to his realty, and to enjoin its enforcement, evidence examined, and *held* sufficient to show that defendant, at the time of the assignment by plaintiff of a mortgage securing the note, entered into an agreement in writing to indemnify plaintiff against the payment of the note, as a consideration of plaintiff's assignment of the mortgage.

Smith v. Nelson, 1.

SUIT TO CANCEL A DECREE—BILL OF REVIEW.

3. A suit to cancel a decree against plaintiff for the amount due on a note, as a cloud on the title to his realty, and to enjoin its enforcement, on the ground that defendant had agreed with plaintiff to indemnify him against the payment of the note, as a consideration of plaintiff's assignment of the mortgage securing the note, is not in the nature of a bill of review, within B. & C. Comp. § 391, abolishing that form of suit.

Smith v. Nelson, 1.

LEGAL CAPACITY OF INFANTS TO PERSONALLY ASSERT AN ADVERSE CLAIM.

4. An adverse claim to an interest in real property, within B. & C. Comp. § 516, providing that any person claiming such an interest in land not in the actual possession of another may sue in equity another who claims an interest therein adverse to him, is the expressed assertion of a right by a claimant of suitable age and sufficient intelligence.

Harding v. Harding, 178.

RAILROADS.

RUNNING RAPIDLY AS NEGLIGENCE.

1. The running of a train at a high speed cannot usually be said, as a matter of law, to be negligent, it being but a fact to be considered in connection with other circumstances.

Norwich Insurance Society v. Oregon Railroad Co. 123.

STOCK KILLED ON TRACK—LIMITS OF STATION GROUNDS.

2. The entire space between the shortest switch connection with the main line in a railroad yard is within the yards or station grounds that need not be fenced under Section 5146, B. & C. Comp.

Harvey v. Southern Pacific Co. 505.

FIRES—ALLEGATIONS AND PROOFS.

3. The allegations in a complaint that the engine that caused the fire "was unskillfully and improperly constructed, and improperly and negligently managed by defendant and its servants, and, by reason of said improper and negligent management, large quantities of sparks were emitted," are sufficiently broad to let in proof of the character of the care and caution exercised by defendant's employees in managing the engine referred to as doing the damage, and whether they were negligent in the performance of their duties, and such instruction does not submit to the jury an issue without the scope of the pleadings.

Norwich Insurance Society v. Oregon Railroad Co. 123.

FIRES—INSTRUCTION NOT ASSUMING FACTS.

4. Where it is shown that a fire was the result of the operation of a railroad train, an instruction that "It is not necessary that any specific act of negligence be pointed out, if the circumstances established are such as a jury may infer negligence from, such as running at a high rate of speed, working the engine hard, overloading it, or other acts indicating an unusual course in operating the engine," etc., is not erroneous as assuming that the train was running at a high rate of speed.

Norwich Insurance Society v. Oregon Railroad Co. 123.

FIRES—INSTRUCTION AS TO USUAL CARE OF EMPLOYEES.

5. In an action against a railroad company for damages resulting from a fire caused by sparks from an engine, an instruction: "You have a right to take into consideration every fact and circumstance which tends to demonstrate * * the kind of care and caution usually exercised by defendant's employees in charge of the engine which is alleged to have set the fire," is not objectionable, since, if the jury should conclude that the employees in charge of that engine had usually been careless or negligent, they might with propriety infer that such employees were careless at the time the fire in question occurred.

Norwich Insurance Society v. Oregon Railroad Co. 123.

FIRES BY ENGINES—EVIDENCE OF OTHER FIRES.

6. In an action for damages resulting from a fire set by a passing locomotive, where plaintiff did not identify the particular engine that caused the fire, the jury may consider evidence as to other fires about that time caused by engines of the defendant, and as to the scattering of live coals about the time in question by such engines.

Manchester Assurance Co. v. Oregon Railroad Co. 162.

Duty to Light Station Platforms. See **CARRIERS**, 2, 3, 4.

When Person at Station Is Passenger. See **CARRIERS**, 1.

RATIFICATION.

Competent Evidence as to Agent's Acts. See **PRINCIPAL & AGENT**, 1, 2, 3.

Evidence as to Approval of Act of Creditor. See **PAYMENT**.

REAL PARTY IN INTEREST.

Position of Indorsee for Collection. See **BILLS & NOTES**, 3, 4.

RECEIVERS.**FEES FOR COUNSEL OF RECEIVERS.**

1. Receivers ordinarily are allowed to employ counsel to advise them on matters of law, in order to avoid interrupting the court, and the fees of such counsel constitute a part of the expense of the receivership.

Wilder v. Reed, 54.

APPEAL FROM ORDER ALLOWING FEES TO COUNSEL.

2. An ex parte order allowing fees to counsel for a receiver is not a final order from which an appeal may be taken.

Wilder v. Reed, 54.

RECORDS.

Easement in Recorded Deed—Notice. See VENDOR & PURCHASER, 7.

REFERENCE.

Actions for Money—Long Accounts. See EQUITY, 1.

REFORMATION OF INSTRUMENTS.

REFORMATION OF DEED—CONSIDERATION.

An agreement to pay part of the cost of a building to be constructed on a designated lot is a sufficient consideration to sustain a suit to reform an error in the description.

Clark v. Hindman, 67.

REFRESHING MEMORY. Use of Memoranda. See WITNESSES, 2.

RELATIVES.

Compelling Support of by Relatives. See COUNTIES, 4.

REMEDY AT LAW.

Jurisdiction of Equity in Actions for Money. See EQUITY, 1.

REMOVING CLOUD. Same as QUIETING TITLE.

REPEAL.

Implied Repeal by Amendatory Law. See STATUTES, 6, 7, 8.

REPLEVIN.

UNDIVIDED INTEREST IN A MASS.

Replevin will not lie for an undivided part of a mass of uneven quality, as, for an interest in a number of bales of hops varying in weight and grade.

Schwarz v. Lee Gon, 219.

REPUTATION. Evidence of. See CRIMINAL LAW, 5.

RESCISSION.

Contracts for Sale of Land—Right of Vendee. See VEND. & PUR. 11. 12.

Cancellation of Deed for Fraud or Improvidence. See CANCELLATION OF INSTRUMENTS.

Cancelling Executed Contract Without Returning Consideration—Absence of Fraud. See CONTRACTS, 5.

RES JUDICATA. See JUDGMENT, 4.

RESTRICTIVE INDORSEMENT.

Effect of on Rights of Indorsee. See BILLS & NOTES, 4, 5.

RESULTING TRUST.

Conveyance to Married People Jointly. See p. 599.

RIGHT OF WAY.

Sale of Part of Tract—Way of Necessity. See EASEMENTS, 5.

RIPARIAN RIGHTS. See WATERS.

ROADS. Same as HIGHWAYS.

ROBBERY.

INFORMATION—DEFECTIVE CHARGE OF VIOLENCE.

1. A charge that certain named defendants unlawfully took sundry coins from a specified person, and "that the said money was then and there unlawfully and feloniously taken from the person of said D. against his

will and by violence," is not a charge of the use of violence by the defendants, and the indictment is fatally defective in not charging the defendants with every act necessary to constitute a robbery. *State v. Eddy*, 625.

INFORMATION—NAMING OWNER OF STOLEN PROPERTY.

2. It is not necessary under Section 1305, B. & C. Comp., to state in an indictment for robbery the name of the owner of the property taken. *State v. Eddy*, 625.

RULES OF COURT.

Rule 16, proviso..... 9

SALES.

WHEN TITLE PASSES.

When property is identified by seller and buyer, weighed, marked and paid for, the sale is complete and title passes, though the property is left with the seller under an agreement as to future delivery.

La Vie v. Tooze, 206.

SELF-DEFENSE.

Invocation of by Provoker of Fatal Quarrel. See HOMICIDE, 1.

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SHERIFFS AND CONSTABLES.

RECORDS OF COUNTY COURT CONCERNING OFFICIAL BONDS.

1. While the county court should keep a record of the delivery and acceptance of sheriffs' bonds, and should regularly approve the bonds, and enter the approval upon the minutes and file the undertakings with the clerk, an omission to do these things is not fatal to an enforcement of such a bond, where it is actually given and accepted.

Baker County v. Huntington, 275.

PAROL EVIDENCE OF ACCEPTANCE OF OFFICIAL BONDS.

2. While the record of the county court is the best evidence of the delivery and acceptance of a sheriff's bond, yet, where the proper foundation is laid, such delivery and acceptance may be shown by secondary parol testimony.
Baker County v. Huntington, 275.

See **OFFICERS, PRINCIPAL & SURETY.**

SPECIFIC PERFORMANCE.

CONSIDERATION.

1. An agreement to pay part of the cost of a building to be constructed on a designated lot is a sufficient consideration to sustain a suit to specifically perform by executing a corrected deed.
Clark v. Hindman, 67.

SPECIFIC PERFORMANCE OF UNACCEPTED CONTRACT.

2. Where a contract obligated defendant to execute to plaintiff a lease, with an option to purchase, and plaintiff refused to accept the lease for no fault of defendants, plaintiff could not maintain a suit for damages or specific performance based on the option clause which would have been in the lease if accepted.
Livesley v. Muckle, 420.

STATE CONSTITUTION. Same as **CONSTITUTION OF OREGON.**

STATE LAND BOARD.

Power of State Board to Waive Forfeiture. See **PUBLIC LANDS**, 1.

STATE LANDS. Same as **PUBLIC LANDS.**

STATES.

STATUTES—IMPLIED REPEAL—PAYMENT OF STATE EMPLOYEES.

Laws 1905, p. 192, c. 99, providing for the monthly payment of salaries of certain employees and officers of the State, and repealing laws in conflict therewith, was an independent act, and did not repeal or affect B. & C. Comp. § 2398, declaring that no warrant shall be drawn by the Secretary of State in payment of any claim against it unless an appropriation has first been made therefor.
Calbreath v. Dunbar, 580.

STATION GROUNDS.

Limits of Trackage Not Required to Be Fenced. See **RAILROADS**, 2.

STATUTE OF FRAUDS.

INTENT OF THE STATUTE.

1. The statute of frauds was not intended to aid dishonest persons in the perpetration of injustice or dishonesty.

Neppach v. Oregon & California Railroad Co. 374.

ADMINISTRATORS—AGREEMENT FOR LIEN ON LANDS—VALIDITY.

2. Where an administrator and another had succeeded to all the interests of the estate, and, the personal property being exhausted, such parties agreed that the commissions due the administrator, together with moneys advanced by him individually, should be a lien on the lands of the estate, and in pursuance of the agreement the administrator entered into possession of the lands, and it was agreed that the profits should be divided according to the interest of the parties, the agreement was void, under the statute of frauds, and the administrator not entitled to enforce his lien in equity.
Tucker v. Ottenheimer, 585.

STATUTE OF LIMITATIONS. Same as **LIMITATION OF ACTIONS.**

STATUTES.

TIME WHEN LOCAL OPTION LAW TOOK EFFECT—CONSTITUTIONALITY.

1. The local option law adopted in June, 1904 (printed in Laws 1905,

pp. 41-50), providing that upon the filing of a petition of a designated kind the county court shall order an election to determine whether the sale of intoxicating liquors shall be permitted or prohibited in the political subdivisions designated in the petition, and that if the vote is against permission the prohibition shall take effect on the first day of July next succeeding, is a general act, and became a law pursuant to the governor's proclamation on June 24, 1904. *Fouts v. Hood River*, 492.

CONDITION OF TAKING EFFECT.

2. The local option law adopted in June, 1904, is not within the prohibition of Const. Or. Art. I, § 21, providing that no laws "shall be passed the taking effect of which shall be made to depend upon any authority, except as provided" in said constitution, though the operation of the prohibitory feature is conditioned on the vote in the subdivisions designated by the petition. *Fouts v. Hood River*, 492.

LOCAL AND SPECIAL LAWS AS TO SALES OF LIQUORS.

3. As Const. Or. Art. IV, § 23, does not prohibit special or local laws concerning the sale of intoxicating liquors, there seems to be no limitation on the power to legislate locally on that subject, so that the local option act adopted in 1904 (Laws 1905, pp. 41-50), is not void because it may operate in only some districts. *Fouts v. Hood River*, 492.

LOCAL OPTION LAW—SPECIAL ACT PUNISHING CRIMES—REGULATING PRACTICE IN COURTS OF JUSTICE.

4. The local option law adopted in Oregon by popular vote in 1904 (Laws 1905, p. 41, c. 2) is not a special or local law for the punishment of crimes and misdemeanors, or regulating the practice in courts of justice, as prohibited by Const. Or. Art. IV, § 23, subds. 2 and 3. *Fouts v. Hood River*, 492.

TITLE OF ACT.

5. It is not necessary to insert in the title of an act defining the boundaries of a particular county the name of every other county adjoining at the points of change, or surrounding it, if the act establishes a new county. For instance, Laws 1893, p. 161, entitled "An act to more definitely establish the boundaries of W. county," was not void for failure of such title to contain a reference to C. county adjoining, whose boundaries were affected by the act. *Allison v. Hatton*, 370.

EFFECT OF RE-ENACTING STATUTE—AMENDMENT BY IMPLICATION.

6. Parts of statutes that are copied into amended statutes are usually read as parts of the original statute, when considered in connection with an intermediate conflicting statute, and only the new parts of the amended law are considered as enacted at that time. *Allison v. Hatton*, 370.

IDEM.

7. Laws 1905, p. 192, c. 99, providing for the monthly payment of salaries of certain employees and officers of the State by warrants drawn by the Secretary of State on the State Treasurer for the aggregate amount allowed in favor of the superintendent, president, or other officer of the institution, who is required to give bond to the State to pay over the proceeds of such warrant immediately to the persons entitled thereto, and repealing laws in conflict therewith, was an independent act, and did not repeal or affect B. & C. Comp. § 2398, declaring that no warrant shall be drawn by the Secretary of State in payment of any claim against it unless an appropriation has first been made therefor. *Calbreath v. Dunbar*, 580.

IMPLIED REPEAL OF STATUTE BY SUBSEQUENT ACT—CONFLICT BETWEEN
LOCAL OPTION ACT AND CITY CHARTER.

8. The State local option law (Laws 1905, p. 41, c. 2) does not supersede a city charter giving the council power to grant licenses and to provide for the revocation thereof, and to regulate and restrain liquor dealers and their places of business, the general act being only a modification of the earlier special municipal act, in that its application is dependent upon a vote for prohibition at an election. Until such an expression of the popular will the charter powers are unchanged.

Sandys v. Williams, 327.

CONSTRUCTION OF STATUTE AS AFFECTED BY NONUSER.

9. The fact that a penal statute has been on the statute books for over forty years, and has not been applied in a particular manner, does not preclude the application and enforcement of the statute in that manner if it may properly be so applied and enforced.

State v. Nease, 433.

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SURETY. Same as **PRINCIPAL & SURETY.**

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SWAMP LANDS.

Description of Land Not Swamp or Overflowed. See **PUBLIC LANDS**, 4.

TAXATION.

ACTION TO DETERMINE SITUS OF LAND FOR TAXATION.

1. A suit by citizens and taxpayers to restrain the sale of land for taxes assessed against it is a proper remedy to determine in which of two counties plaintiffs' lands were subject to assessment.

Allison v. Hatton, 370.

POWER OF COUNTY OVER LAND BOUGHT FOR DELINQUENT TAXES.

2. Under Laws 1893, p. 28, authorizing the county judge to purchase property at delinquent tax sales, and declaring that it shall become the property of the county, subject to redemption, such property, after purchase, is entirely under the control of the county commissioners, and the interests of other municipalities therein are subject to its disposal.

Multnomah County v. Title Guarantee Co. 523.

IDEM.

3. The clause in Laws 1893, p. 28, providing that land purchased by a county for unpaid taxes shall become the property of such county subject to redemption, is intended to preserve to the owner the right to redeem, and not to prevent the county from otherwise disposing of it. The county may dispose of it as may be deemed advisable, as, by compromising its title and giving up its claim entirely.

Multnomah County v. Title Guarantee Co. 523.

TENDER.

EFFECT OF TENDER AS AN ADMISSION OF TRUTH OF COMPLAINT.

Under Section 532, B. & C. Comp., providing for a written offer by defendant to allow a certain judgment to be entered against him, which must be accepted within a stated time, or it shall be deemed withdrawn, in which event evidence thereof shall not be received at the trial, such an offer is not, after failure to accept it, an admission at all, and the case stands as though no offer had been made.

Young v. Stickney, 101.

TIDE LAND.

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Right to Rule to Supply Defective Record. See JUSTICES OF PEACE, 3.

TRIAL.

DISCRETION AS TO COMPELLING ELECTION.

1. Whether a motion to require a party to elect should be granted is largely discretionary, care being had to promote justice and truth.

Harvey v. Southern Pacific Co. 505.

LEADING QUESTION.

2. In an action on a note, it was not error to sustain an objection to a question asked of plaintiff as to whether defendant's agent had authority to instruct plaintiff to credit a certain amount on the note as a part payment, before any attempt had been made to prove such alleged agency. the form of the question being also objectionable. *Sloan v. Sloan*, 36.

CONSIDERATION OF EVIDENCE ON MOTION FOR NONSUIT.

3. As a motion for a nonsuit admits the truth of plaintiff's testimony, if there is any competent evidence tending to support the cause he is entitled to have it go to the jury. *Morgan's Estate*, 233.

QUESTION FOR JURY.

4. The evidence, while conflicting, is quite sufficient to sustain the finding of the jury in plaintiff's favor, and the conclusion thus made will not be reviewed. *Pacific Export Co. v. North Pacific Lumber Co.* 194.

REQUESTS FOR INSTRUCTIONS.

5. Instructions particularly desired should be presented to the court, and it is not the duty of the supreme court to survey the entire testimony in order to determine what instructions should have been given.

Beadle v. Paine, 424.

INSTRUCTIONS—REPEATING QUALIFYING PHRASES.

6. Where proper instructions have been given in reference to a particular class of persons or with certain qualifying expressions, it will not be necessary to repeat them with every paragraph.

Beadle v. Paine, 424.

INSTRUCTIONS CONSIDERED AS A WHOLE.

7. Objections to parts of a charge ought not to be sustained if, taken as a whole, the charge fairly states the law as applied to the facts of the case. *State v. Gray*, 24.

IRRELEVANT AND ABSTRACT INSTRUCTIONS.

8. Instructions not applicable to the case should be refused.

Pacific Export Co. v. Pacific Lumber Co. 194; *Busch v. Robinson*, 539.

REFUSING INSTRUCTIONS ALREADY GIVEN.

9. Instructions proposed by counsel may properly be refused when they have already been practically given in the language of the judge.

State v. Gray, 24; *Barnes v. Leidigh*, 43; *Pacific Export Co. v. North Pacific Lumber Co.* 194.

TRIAL BY COURT—SCOPE OF FINDINGS.

10. A finding of fact by a trial judge sitting without a jury that finally determines the case often renders findings on intermediate issues unnecessary, and it is not prejudicial error to refuse findings on such issues. For example: In an action for money by an assignee of a claim, after findings for defendant on the question of indebtedness, it is immaterial who owns the claim, and a refusal to find on that issue is not error.

Lewis v. First National Bank, 132.

TRIAL BY COURT—SUFFICIENCY OF FINDINGS.

11. Findings that a debtor pledged to its creditor a warehouse receipt for sundry chattels, that the obligation thus secured was not paid at maturity, in consequence of which the creditor sold the chattels pursuant to the terms of the pledge, impliedly finds that the property pledged was delivered to the creditor, as a warehouse receipt stands for the property stored.
Lewis v. First National Bank, 182.

MATERIALITY OF FINDINGS.

12. A bankrupt having within four months of being adjudged insolvent pledged a warehouse receipt to a bank as security for a note for money then borrowed, with provision that, if the note was not paid at maturity, the bank might sell the security and with the proceeds discharge such note, and credit the surplus on prior notes of the bankrupt to the bank, and the trustee having sold and assigned the claim for the surplus and the assignee having sued only for such excess—there is no disaffirmance, but a ratification, of the act of the bankrupt; so that the question of the bank having cause to know that a preference was intended is immaterial.
Lewis v. First National Bank, 182.

TRIAL BY COURT—ADMITTED ISSUES.

13. It is not necessary for a court to make findings covering facts admitted by the pleadings.
Jennings v. Frazier, 470.

TRIAL BY COURT—NECESSITY OF FINDINGS ON MATERIAL ISSUES.

14. Where an action at law is tried without a jury, it is the duty of the court on its own motion to make findings of fact covering all the material issues made by the pleadings.
Jennings v. Frazier, 470.

FINDINGS ON INTERMEDIATE ISSUES.

15. Where either party desires findings on issues made by the evidence, outside the pleadings, but deemed important for a presentation of the questions involved, the proper practice is to request the court to make such findings; and, without such a request, error cannot be predicated on its failure to do so.
Jennings v. Frazier, 470.

IDEM.

16. Where plaintiff alleged that a sale by defendant to the garnishees and the purchase by them was not bona fide, but was made in trust to defraud creditors, which was denied, and the court found that the sale was bona fide, without notice, and passed title, it substantially covered the issue, and unless by special request, it was not the duty of the court to find as to whether the sale was made to defraud plaintiff, or whether the buyers were put on notice, or whether there was a valuable consideration, those all being minor points included within the general findings made.
Jennings v. Frazier, 470.

TRUSTS AND TRUSTEES.

EFFECT OF DESIGNATING A PARTY AS TRUSTEE—SURVIVORSHIP.

1. A contract or deed describing parties thereto as "trustees," without explanation, implies a trust in favor of an undisclosed principal; and in enforcing a contract based on such an instrument the survivor must sue alone to the exclusion of the personal representatives of the deceased trustee.
Maffet v. Oregon & California Railroad Co. 433.

RESULTING TRUST NOT PRESUMED BETWEEN HUSBAND AND WIFE.

2. In the case of a purchase of land by a husband, the title being taken in the name of his wife, or in the name of himself and wife, it will be presumed that the purchase price was an advancement or gift to the wife, rather than that the title was held by the wife as trustee.
Hayes v. Horton, 597.

UNDIVIDED INTEREST.

Replevin for Unsegregated Part of a Mass. See **REPLEVIN**.

UNITED STATES CONSTITUTION.

Same as **CONSTITUTION OF THE UNITED STATES**.

UNITED STATES STATUTES.

Same as **STATUTES OF THE UNITED STATES**.

USURY.**UNLAWFUL CONTRACTS—DIVISION OF PROFITS.**

Where one of the owners of certain options on unpatented mining claims, being largely indebted to C. and two of his associates, among others, made a settlement with them, in which he agreed to pay \$20,000 and one-tenth interest in such options conditionally on his being able to acquire title to the property, which amount should come out of the property, in order to induce C. and his associates to permit their attorney to act for him in the matter, and thereafter, when it became apparent that such owner would lose the property, and C. and his associates would get nothing by their settlement unless they could raise more money, they agreed with their other coplaintiffs that, if they would join in raising such additional money to clear the title, they would divide the amount, giving to them under the settlement pro rata, and the settlement agreement took place more than a year prior to the execution of the mortgage on the claims to secure the money raised, and the amount fixed by the settlement was not included in the mortgage, such agreement was insufficient to sustain a defense of usury.

Curtze v. Iron Dyke Mining Co. 601.

VACATING JUDGMENT.

Review of Order—Discretion. See **APPEAL & ERROR**, 13.

For Surprise and Excusable Neglect. See **JUDGMENT**, 1.

VENDOR AND PURCHASER.**SPECIFIC PERFORMANCE OF UNACCEPTED CONTRACT.**

1. Where a contract obligated defendant to execute to plaintiff a lease, with an option to purchase, and plaintiff refused to accept the lease for no fault of defendants, plaintiff could not maintain a suit for damages for specific performance based on the option clause which would have been in the lease if accepted.

Livesley v. Muckle, 420.

CONTRACT—ESTATE INTENDED BY THE PARTIES TO BE CONVEYED.

2. A contract by a grantee of public land under an act of congress to convey "unto the second party, their heirs and assigns (upon request and surrender of this contract, provided the said party of the first part shall have then received the patent therefor from the United States, and when said lands hereby contracted to be sold shall have been patented to said party of the first part), a deed conveying all the right, title, and interest of the first party in and to said premises," manifestly contemplates that the purchaser is to receive the fee simple title, and not a qualified or inferior right to the land, unless it should be mineral, in view of the terms of the government grant as stated in 14 Stat. U. S. c. 242.

Maffet v. Oregon & California Railroad Co. 443.

WAIVER OF TERMS OF CONTRACT BY PURCHASER.

3. Where a contract provided that defendant would start a mill and demonstrate that it could be successfully run, and then would execute a lease to plaintiff, but plaintiff, immediately upon the making of the contract, entered into possession of the mill himself, and successfully ran the

same without requiring or requesting defendant to make such demonstration, the conditions of the contract requiring a demonstration by defendant were waived.
Livesley v. Muckle, 420.

PAYMENT OF PURCHASE PRICE—STATUTE OF FRAUDS.

4. A party to a written contract for the sale of land, who knowingly gives an oral consent to a postponement of the performance of some material provision that is of benefit to the one consenting, will not be permitted to insist, after the other party has acted on the consent, that such consent is void because not written, and enforce the contract as originally made, even though time and the prompt performance of the deferred condition were made essential.

Neppach v. Oregon & California Railroad Co. 374.

PURCHASE PRICE—INCREASED INTEREST AFTER DEFAULT.

5. A contract for the conveyance of land providing for payment by installments with interest, that a higher interest shall be paid if any installment becomes overdue, declaring time to be of the essence of the agreement, and that upon a failure to make any payment when due the contract shall become null and void, and all rights of the vendee shall cease without any declaration of forfeiture or act of re-entry or any other act by the vendor to be performed, is self-forfeiting, and the provision for higher interest upon a failure to make any payment when due is not a penalty available to the vendee as condition of avoiding the forfeiture.

Maffet v. Oregon & California Railroad Co. 443.

BONA FIDE PURCHASERS—EASEMENT.

6. An easement appurtenant, as, for example, the right to construct on a stated tract abutments for a dam, passes under a grant of the dominant estate without being specially mentioned.

Sweetland v. Grants Pass Power Co. 85.

IDEM—DEED AS NOTICE.

7. A deed granting an easement in fee is entitled to record, and, being recorded, is notice to subsequent grantees of the servient estate.

Sweetland v. Grants Pass Power Co. 85.

RIGHTS OF VENDOR—WAIVING CONDITIONS OF SALE.

8. Conditions for the benefit of the vendor in a contract of sale, as, the right to forfeit, or the acceptance of a self-executed forfeiture, may be waived at his option and performance be tendered as stipulated.

Maffet v. Oregon & California Railroad Co. 443.

RIGHTS OF VENDOR—HOW WAIVER MAY BE INDICATED.

9. A waiver of self-executing provisions for forfeiture in a contract for the sale of land may be accomplished by an express agreement, or by unequivocal acts or demeanor leading the purchaser to neglect strict and punctual compliance with the terms of the contract in reliance thereon.

Maffet v. Oregon & California Railroad Co. 443.

RIGHTS OF VENDOR—REINSTATEMENT AFTER WAIVING FORFEITURE.

10. A vendor who has once waived a forfeiture incurred by the terms of a contract for the sale of land cannot ordinarily again assume his original relations to the vendee, and insist upon the enforcement of the forfeiture, without giving the vendee proper notice of his intention so to do, and reasonable time within which to comply with the demand for payment.

Maffet v. Oregon & California Railroad Co. 443.

RIGHTS OF PURCHASER—RECOVERY OF PRICE PAID.

11. Upon a refusal by a vendor to comply with his contract to sell

and convey, the purchaser may also rescind and maintain an action for the purchase money already paid.

Maffet v. Oregon & California Railroad Co. 443.

IDEM.

12. A contract for the sale of land declared time to be of its essence, and provided for a self-executing forfeiture in case of default in payment of any installment of the purchase price. Owing to uncertainty as to the state of the vendor's title, the parties entered into a supplementary agreement whereby further payments were to be dispensed with until such title was settled. In reliance on this later agreement the purchaser refrained from making the additional payments required by the original contract, when the vendor, some years later, and without any notice or request for payment, canceled the contract and forfeited all money paid under its provisions. *Held*, that the purchaser was justified in accepting the rescission, thereby rendering it mutual, and in suing for the price paid as money had and received to his use.

Maffet v. Oregon & California Railroad Co. 443.

RIGHTS OF PURCHASER ON FAILURE OF TITLE.

13. Where the vendee in an executory contract for the purchase of real estate takes possession, and the title of the vendor falls, or he is unable to make conveyance as stipulated, the purchaser's remedy is either to rescind the contract, and to restore or offer to restore possession, in which case he may recover the purchase money and interest, or to retain possession under the contract, pay the purchase price, and accept such title as the vendor may be able to give. He cannot retain both the land and the purchase money until a perfect title is offered to him.

Livesley v. Muckle, 420.

DAMAGES FOR FAILURE TO CONVEY LAND—ELEMENTS OF VALUE.

14. While the value of real estate cannot be shown by proving the value of the several constituent elements of value and then adding those together, yet a witness who has given his opinion as to the market value of the land may state the facts upon which his opinion is based, although they involve the character and value of a constituent element of the realty, such as timber.

Neppach v. Oregon & California Railroad Co. 374.

MEASURE OF DAMAGES FOR FAILURE OF VENDOR TO CONVEY.

15. The vendee's damage for the vendor's refusal to convey is the value of the land agreed to be conveyed at the time of such refusal, less the unpaid purchase price.

Neppach v. Oregon & California Railroad Co. 374.

VENUE.

Location of Actions on Life Insurance Policies. See **INSURANCE**, 6, 7.

VOTING TRUST.

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Of Defect of Parties—Laches. See **PARTIES**, 2.

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Of Requirements of Contract by Purchaser. See **VEND. & PUR.** 3.

Of Terms of Contract by Seller—Reinstatement. **VEND. & PUR.** 8, 9, 10.

WATERS AND WATER COURSES.

NATURAL WATER COURSE—REMOVING INTERFERENCE.

1. Though a dam maintained by defendant interrupts the flow of water to which plaintiff is entitled, defendant need not remove it, where the water would then injure his land, so long as he adopts other means to bring the water to plaintiff's lands. *Harrington v. Demaris*, 111.

NATURAL WATER COURSE—CHANGING CHANNEL.

2. Where the respective owners of different tracts of land, by a concert of action, remove a dam, and permit water from the springs of a swamp to run into a stream which the water from the springs had never run into before, they thereby make the springs tributary to the stream and subject to the rules of law applicable to riparian ownership.

Harrington v. Demaris, 111.

EASEMENT BY PRESCRIPTION—WATERS.

3. The continuous use of a ditch for thirty-five years by the one who dug it and his successors in interest creates an easement that will be protected by the courts. The word "ditch" may also include a natural slough that has been used as part of the waterway.

Board of Regents v. Hutchinson, 57.

PLEADING PURPOSE OF DIVERTING WATER—BURDEN OF PROOF.

4. An answer, in an action to restrain diversion of water, alleging continuous adverse user of the water for more than ten years, imposes on defendant the burden of proof in sustaining such allegation.

Bauers v. Bull, 60.

PRESUMPTION AS TO NATURE OF USE BY DECEASED CLAIMANT.

5. Where a deceased person probably attempted to assert an adverse claim of possession, the presumption is that it was initiated under a claim of right, and the burden then rests on the person against whom the adverse possession or use is asserted to show that the deceased and his successors were licensees.

Bauers v. Bull, 60.

ADVERSE USE—LIMITATION OF ACTION.

6. A riparian owner claiming a right to use part of the water of a stream cannot assert an adverse right to any water as against an upper proprietor whose use has not been curtailed so that he has been called upon to notice the claim of the lower owner.

Harrington v. Demaris, 111.

ADVERSE USE OF UNCLAIMED WATER.

7. The use by an upper riparian proprietor of water from a spring which is not tributary to the stream is not adverse to the rights of a lower owner on the same stream.

Harrington v. Demaris, 111.

NEGLIGENT USE OF IRRIGATING DITCH.

8. The owners of an easement must so use it as not to unnecessarily injure the servient estate. For example, one having an easement across farming land for an irrigating ditch, will not be permitted to allow the ditch to become stopped with debris and thus cause the water to injure the adjoining land, or otherwise use it so that it becomes a nuisance to the land affected.

Board of Regents v. Hutchinson, 57.

CONSTRUCTION OF GRANT TO BUILD DAM.

9. A grant to a power company and its successors and assigns forever of the right to go on land on the bank of a river and construct an abutment for a dam, and to keep the same in repair, is a grant of an easement in fee, appurtenant to the grantee's plant and the realty on which it was situated, so as to pass to its successors, in view of the fact that at the

time it was made the grantee was constructing on the opposite side of the river a plant to be operated by water power, and was constructing a dam for that purpose, to the knowledge of the grantor.

Sweetland v. Grants Pass Power Co. 85.

CONSTRUCTION OF GRANT TO OVERFLOW LAND.

10. A grant of the right to construct on land an abutment for a dam, "together with the * * right * * and privilege forever to flow the waters of said * * river back upon and over the said land of the (grantor) at * * all times as a result and in consequence of said dam * * without any claim * * for damages" by the grantor, "his heirs or assigns," is sufficiently broad to prevent an action by the grantor or his successor in title for overflowing the land.

Sweetland v. Grants Pass Power Co. 85.

POWER OF IRRIGATION DISTRICTS OVER PRIVATE WATER RIGHTS.

11. The Oregon irrigation district law of 1895 (Laws 1895, pp. 13, 32), was intended to enable the owners of a certain class of lands to form a corporation that may construct or acquire irrigation facilities and water rights and to furnish water to the landowners of the district for irrigation purposes, but was not meant to authorize such a corporation to exercise any control over the rights or property of individuals.

Little Walla Walla Irrigation District v. Preston, 5.

CONTROL OF IRRIGATION DISTRICTS OVER PRIVATE RIGHTS.

12. An irrigation district incorporated under the law of 1895, which does not own or control water, water rights, or water ditches, cannot maintain a suit in equity to determine the rights of private water owners among themselves or to enforce any regulations as to the use of the water, is not being a party in interest.

Little Walla Walla Irrigation District v. Preston, 5.

Condemnation of Water and Ditch Rights. See EMINENT DOMAIN.

WAYS.

Right to Way of Necessity. See EASEMENTS, 5.

WILLS.

SUFFICIENCY OF TESTAMENTARY WRITING—WITNESSES.

1. A paper purporting to be a will, but not witnessed, executed in another State by a person not a mariner or soldier, is not entitled to probate in Oregon, under Sections 5548 and 5561, B. & C. Comp., and is not effectual to transfer the title to real property in this State.

Montague v. Schieffelin, 413.

A LETTER NOT A WILL OR CODICIL.

2. An ordinary letter is neither a will nor a codicil, being unattested, as required by Sections 5548 and 5575, B. & C. Comp.

Montague v. Schieffelin, 413.

SUFFICIENCY OF UNPROBATED DOCUMENT TO CONVEY PERSONAL PROPERTY.

3. A document insufficient as a will, under the laws of Oregon, and not probated elsewhere, is not evidence of any statements therein contained as a bequest of personalty.

Montague v. Schieffelin, 413.

WITNESSES.

MEMORANDUM AS EVIDENCE UNDER OREGON STATUTE.

1. The old rule as to the use by witnesses of memoranda made by themselves or others has been so modified by Section 848, B. & C. Comp., that the memorandum can be used only when it was made by the witness or under his direction. If the memorandum was made by another and

not under the direction of the witness, it cannot be referred to, even though the witness saw it soon after it was made, and then knew of his own knowledge that it conformed to the facts.

Manchester Assurance Co. v. Oregon Railroad Co. 162.

MEMORANDA—NATURE OF EVIDENCE—REFRESHING MEMORY.

2. Memoranda are but secondary evidence, and not competent if the witness is able to testify without referring to them, or if he is able to testify from recollection after refreshing his memory by inspecting them.

Manchester Assurance Co. v. Oregon Railroad Co. 162.

ADMISSIBILITY OF MEMORANDA MADE BY CLERKS.

3. Where locomotive inspectors enter the results of their regular inspections on slips which are filed in a designated office, where the information is, under the regulations of the office, copied by a clerk into a book which the inspectors subsequently sign after comparing the copy with the original data, it is error to permit an inspector to refresh his memory from the book without producing the original entries or accounting for their absence.

Manchester Assurance Co. v. Oregon Railroad Co. 162.

RIGHT OF WITNESS TO EXPLAIN HIS TESTIMONY.

4. A witness is entitled to an opportunity to explain words or expressions used by him in testifying and which he thinks may not have been understood as he meant them.

Pacific Export Co. v. North Pacific Lumber Co. 194.

SCOPE OF CROSS-EXAMINATION—EXAMPLE.

5. A witness who has testified on direct examination only as to being present when a certain dying declaration was made and written out, and as to his having signed it as a witness, cannot be cross-questioned as to whether the writing contained all that was said by deceased on that occasion.

State v. Gray, 24.

CROSS-EXAMINATION COVERING QUESTIONS ALREADY ANSWERED.

6. Where questions put to witnesses on cross-examination were contained in former questions, to which no objections were made, it was within the discretion of the court to allow the questions to be answered or not.

Beadle v. Paine, 424.

EXPLAINING BIAS.

7. Where it appears that a witness is biased he may state in general terms the reasons for his feeling, but details should be avoided.

State v. Lee, 40.

IDEM,

8. For example, in a prosecution for larceny of a calf, after a witness had admitted that he did not feel kindly toward defendant, he should not have been permitted to state that his feelings were influenced by the supposition that defendant had stolen cattle in the neighborhood where he lived, for such a statement was merely an expression of the opinion that defendant was a thief, and was not connected with the disappearance of the calf, nor did it explain the bias of the witness.

State v. Lee, 40.

QUALIFYING EXPERT BY CROSS-EXAMINATION.

9. An error in holding a witness qualified as an expert, on examination in chief, is cured, where, on cross-examination, his qualification is shown.

Rice v. Wallowa County, 574.

See, also, PHYSICIANS AND SURGEONS, 1, 2.

WORDS AND PHRASES.

"CONSPICUOUS PLACE."

A notice posted on the front of a building on a public street, in such a position as to be readily observed by persons entering the building both by the stairway and on the first floor, is in a "conspicuous place," within B. & C. Comp. §5643, providing that a property owner may be relieved of liability for liens by posting a certain notice.

Marshall v. Cardinell, 410.

"DITCH."

The word "ditch" sometimes includes a natural slough or depression that has been or may be used as part of a waterway.

Board of Regents v. Hutchinson, 57.

YARD LIMITS.

Limits of Trackage Not Required to Be Fenced. See RAILROADS, 2.

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